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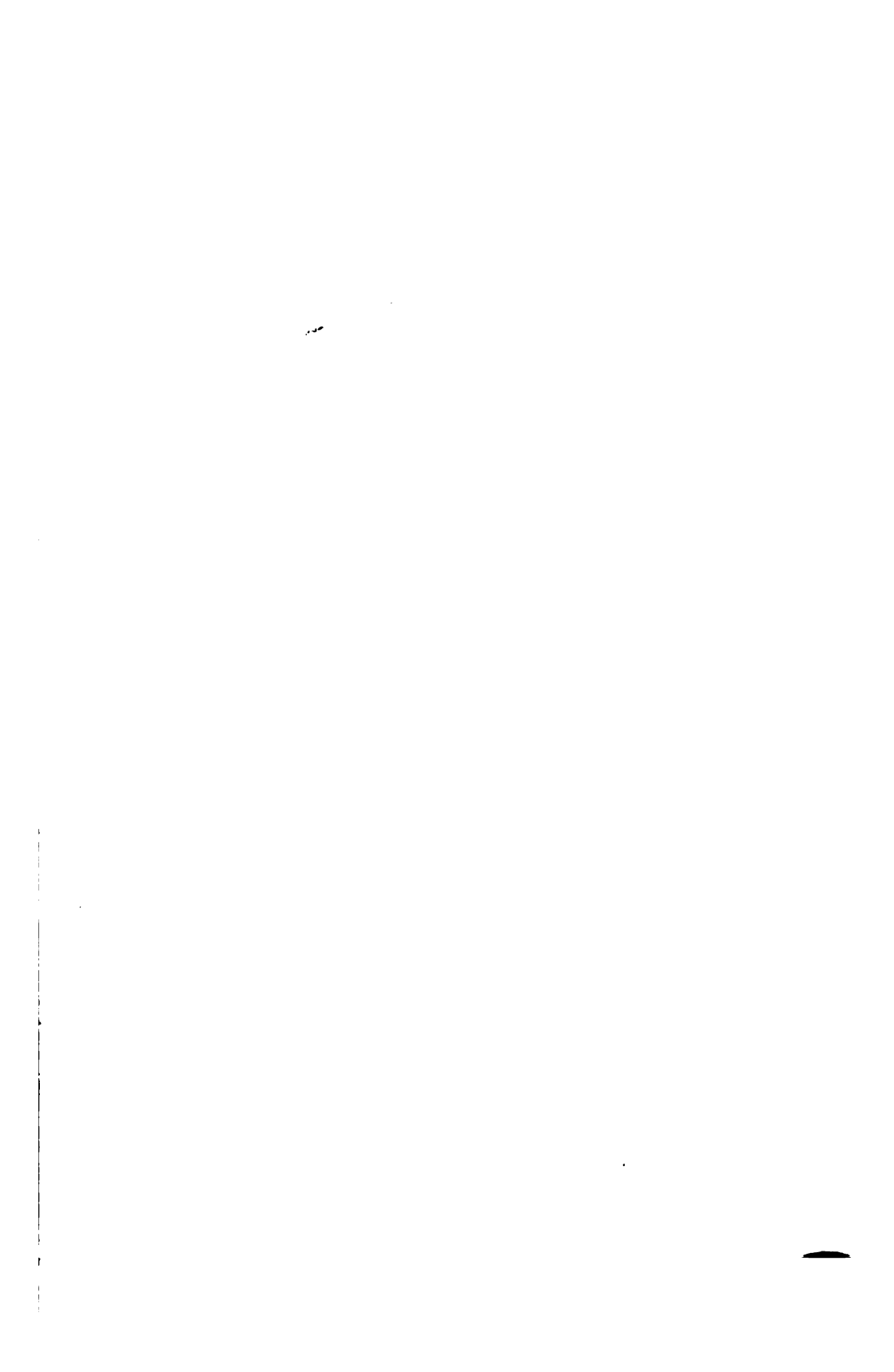
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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

H. L. GEAR,
ASSISTANT REPORTER.

VOLUME 5.

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VICTOR E. SHAW, Associate Justice.

THIRD APPELLATE DISTRICT.

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ELIJAH C. HART, Associate Justice.
ALBERT G. BURNETT, Associate Justice.

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DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

[Civ. No. 315. First Appellate District.—February 7, 1907.]

FISHER AMES, Respondent, v. TERESA BELL, Appellant.

ACCOUNT—PLEADING—BILL OF PARTICULARS—PURPOSE OF CODE PROVISION.—The purpose of the provisions of section 454 of the Code of Civil Procedure, that "it is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand therefor in writing, a copy of the account, or be precluded from giving evidence thereof," is to give the adverse party reasonable notice of the items constituting the claim he is required to meet, so that he may prepare for trial.

Id.—NATURE OF BILL OF PARTICULARS—AMPLIFICATION OF PLEADING—FURTHER ORDER—AMENDMENT.—The bill of particulars required is in the nature of an amplification of the pleading to which it relates, and it is to be construed as part of it for certain purposes; and when the court or judge orders "a further account when the one delivered is too general, or is defective in any particular," as the section provides, the further or amended account is to be construed as an amended pleading for certain purposes.

Id.—WAIVER OF OBJECTION TO AMENDED BILL—MOTION AT TRIAL—OBJECTION TO EVIDENCE.—Where, after the furnishing of an amended bill of particulars by order of court, the defendant made no objection to its items for over five months, and until the very moment of trial, objection thereto was waived, and a motion then made for a further bill of particulars came too late, and was properly denied. The defendant cannot object at the trial to any evidence coming within the general scope of the complaint and the amended bill of particulars.

ID.—EFFECT OF AMENDED BILL—PRIOR BILLS SUPERSEDED—NEW ITEMS —WAIVER OF OBJECTION.—The amended and last bill of particulars ordered by the court superseded former bills, and it may include items of the general account for services not before specifically mentioned in previous bills, and where evidence relating thereto was given without objection, and no motion was made to strike it out as a whole, the evidence as to such items must stand.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

T. Z. Blakeman, for Appellant.

Theodore J. Roche, for Respondent.

COOPER, P. J.—This action was brought to recover \$8,500, balance alleged to be due plaintiff for services as an attorney and counselor at law, performed at defendant's instance and request. The case was tried with a jury, and a verdict rendered for plaintiff in the sum of \$3,000, upon which judgment was entered. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and the order denying the motion.

It is not claimed that the evidence is insufficient to sustain the verdict, nor is there any suggestion that the instructions to the jury were in any respect erroneous. The main contentions of the defendant relate to a bill of particulars furnished by the plaintiff to the defendant, concerning which error is claimed in the refusal of the court to make an order striking out the bill; in the refusal of the court to compel the plaintiff to furnish such bill as it is claimed the court ordered; and the refusal of the court to grant the defendant's motion for a continuance until such time as the plaintiff should have furnished a bill of particulars to comply with the order of the court. As these alleged errors all relate to the one question as to the bill of particulars, we will consider them under the one head.

On November 17, 1902, upon demand of defendant, plaintiff furnished her a bill of particulars which contained the item of \$2,012.50 for eight hundred and five consultations

between September 21, 1895, and October 27, 1898, and the item of \$5,587.50 for legal services rendered at the request of defendant in the matter of the estate of Thomas Bell, deceased, and in the matter of the guardianship of the minors. Upon motion of the defendant, and on the thirtieth day of January, 1903, the court made an order directing plaintiff to make and deliver to defendant a further bill of particulars, specifying separately the services rendered in the estate of Thomas Bell, deceased, and for defendant as guardian of the minors, and the dates and general subjects and nature of the eight hundred and five consultations. On February 14, 1903, the plaintiff delivered to the defendant an amended bill of particulars in response to the order that had been made by the court. Defendant claims that the amended bill of particulars did not comply with the order of the court in certain respects, and, on the sixteenth day of March, 1903, the court, at the request of the defendant, made an order directing the plaintiff to furnish defendant with "an amended and further bill of particulars." On the twenty-eighth day of April, 1903, in response to the second order of the court, the plaintiff served defendant with an amended and further bill of particulars, in which he gave at great length statements of services in the various matters connected with the estate of Thomas Bell, deceased, the guardianship matters, and his various services for defendant as her attorney. This amended and further bill of particulars goes into detail as to dates, times, places, time occupied, and kind of services rendered for the defendant. It takes up one hundred and eighty-seven folios, or nearly half the transcript, and evidently was an attempt in good faith to comply with the order of the court. It was not objected to, except as hereinafter stated, and the case was set down for trial at the request of the parties. The deposition of the defendant was taken. The case was not reached on the trial calendar of the court until October 6, 1903, and during the time intervening after the last bill of particulars was served and up to October 5, 1903, a period of over five months, no objection was made to the last bill of particulars, and no intimation by defendant that she would not be ready for trial. On the day the case was called for trial, and upon only one day's notice, defendant made a motion to strike from the files the last bill of particulars,

and asked for an order to compel the plaintiffs to furnish another bill of particulars, and for a continuance of the case until the plaintiff should comply with the orders of the court already made in regard to the bill of particulars. The court denied each of said motions, and directed the parties to proceed with the trial. In this the court did not abuse its discretion. As to whether or not the defendant should have used more diligence, and asked for relief in regard to the bill of particulars before the trial, so as not to interfere with the orderly conduct thereof, and as to whether or not the amended bill of particulars substantially complied with the order of the court, were matters resting largely in the discretion of the trial judge. It is provided in section 454, Code of Civil Procedure, that when the items of an account are not set forth in a pleading the pleader "must deliver to the adverse party, within five days after a demand therefor in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge may order a further account when the one delivered is too general, or is defective in any particular." The purpose of the above section is to give the adverse party reasonable notice of the items constituting the claim which he is required to meet, so that he may prepare for trial. It is in the nature of an amplification of the pleading to which it relates, and is to be construed as a part of it for certain purposes. It has the effect of restricting the evidence and limiting the recovery to the matters and things set forth therein, provided proper objections are made, and the court's attention called to any material departure from it. When the court or judge orders a further account or bill of particulars, as the section provides may be done, the further or amended account is to be construed as an amended pleading for certain purposes. We therefore have in this case an application made by defendant, at the time the case is ready for trial, for an order requiring the plaintiff to serve a further account or bill of particulars. The court may well have denied the motion, for the reason that, defendant having made no objection to the last bill of items served upon her for over five months, and not till the moment of the trial, the motion came too late. (*Dennison v. Smith*, 1 Cal. 437; *Connor v. Hutchinson*, 17 Cal. 279; *McCarthy v. Mt. Tecate L. & W. Co.*,

110 Cal. 687, [43 Pac. 391]; *Silva v. Bair*, 141 Cal. 601, [75 Pac. 162].)

Plaintiff was allowed to testify, under defendant's objection, to services in examining the claims of seven creditors of the estate of Thomas Bell, deceased, one being a claim for \$16,000, and also to services in the contested claim of one Butler against the estate for \$1,600, and other items of like character. The main ground of objection to the evidence was that the amended bill of particulars was not sufficiently specific, did not set forth the dates on which the several items of services were performed, and that the bill of particulars did not comply with the order of court. The matters concerning which plaintiff was testifying were not wholly omitted from the last bill of particulars, and we are of opinion, from what has already been said, that the defendant had waived the right to any further bill of particulars, or to object to any testimony within the general scope of the complaint and the amended bill. The bill of particulars contained the following items:

"Between the 15th and 18th days of said month (October, 1895), he examined the accounts of seven creditors of said deceased, and thereafter the petitions of two of said creditors, one for a sale of real estate, and the other for an order to show cause; also a return of sale thereon."

"On November 26, 1895, he prepared and filed the answers of defendant to said petitions of said creditors; thereafter, and during said month he received a demurrer to said answers and examined claims of P. F. Butler and Roos Bros. against said estate."

"During said period of time, between said 21st day of September, 1895, and said 27th day of October, 1898, plaintiff was obliged to and did appear repeatedly in court, upon the hearings and trial of said proceedings hereinabove specified, and in relation to matters connected with the administration of said estate."

This was sufficient to notify the defendant of the nature of the charge in the estate of Thomas Bell, deceased, and the amount of the charge as attorney for the guardian of the minors, and authorized evidence as to the nature and character of the services performed under each heading in connection with the estate or the guardianship respectively.

The defendant complains that while the plaintiff made no charge in his first bill of particulars for his services rendered plaintiff in and about the guardianship of the Bell minors, he did make such charge in the last bill. The amended and last bill of particulars superseded the others, and we know of no reason why it might not include all services rendered to and for defendant at her special instance and request. A further answer to the last contention is that the evidence given by plaintiff relative to the guardianship was given without objection, and no motion was made to strike it out. Counsel for defendant, after the testimony was in, moved to strike out the statement of plaintiff as to consultations with defendant in regard to a petition to revoke her letters of guardianship, but the motion only went to the statement as to consultations.

The objection to the inventory and appraisement being received in evidence as to the value of the estate of Bell is extremely technical, and the ruling not of sufficient importance to justify a reversal of the case. Not only this, but it is not clear from the record that the counsel objected on the ground that the inventory and appraisement were incompetent because hearsay.

The judgment and order are affirmed.

Kerrigan, J., and Hall, J., concurred.

[Civ. No. 340. First Appellate District.—February 8, 1907.]

NELLIE KILLIEA, Respondent, v. KATE WILSON and
WILLIAM WILSON, Appellants.

ACTION FOR INDEBTEDNESS—PLEADING—LEGAL CONCLUSION IMPLYING FACT—JUDGMENT BY DEFAULT.—A complaint averring that defendants "within two years last past became indebted to the plaintiff" in a specified sum, followed by other proper averments, though it states a legal conclusion as to the indebtedness, merely implying the material fact, is sufficient, in the absence of a demurrer, to support a judgment by default.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

J. B. Gibson, for Appellants.

Davis & Klein, for Respondent.

HALL, J.—This is an appeal from a judgment taken by default against the defendants, who neither answered nor demurred to the complaint.

The only point raised upon the appeal is that the complaint does not state facts sufficient to constitute a cause of action, and therefore does not support the judgment.

The complaint simply charges "That defendants are husband and wife, and within the two years last past became indebted to the plaintiff in the City and County of San Francisco, State of California, in the sum of nine hundred (\$900) dollars," followed by allegations that no part thereof has been paid save \$280; that the sum of \$620 is now due; that defendants have refused to pay the same or any part thereof, although demand has been made therefor.

It is insisted that the general allegation of indebtedness is but an allegation of a conclusion of law, and is not an allegation of a fact, and therefore the complaint states no cause of action.

Without in detail discussing the various cases cited by appellant in support of his position, it is sufficient to say that in a case later than any cited by appellant, it has been held that an allegation of a conclusion of law, which cannot be distinguished in principle from the allegation in this case, is sufficient to support a judgment by default. (*Penrose v. Winter*, 135 Cal. 289, [67 Pac. 778].) In this latter case there was no allegation of nonpayment of a debt secured by mortgage, save that a specified sum "is now due and owing." The court, however, upon an appeal from a default judgment, held the allegation sufficient to support a default judgment, expressly overruling *Ryan v. Holliday*, 110 Cal. 337, [42 Pac. 891], where the contrary was held. The court said: "It is true that the allegation was made in the form of a legal conclusion, in which the material fact was merely implied,

but, in the absence of any demurrer such faults of pleading are cured by the judgment."

The allegation that a certain sum "is due and owing" is an allegation of a conclusion of law of the same kind as is the allegation that defendants became indebted to plaintiff in a certain sum. There is no difference in principle between the two forms of pleading. The case of *Penrose v. Winter*, 135 Cal. 289, [67 Pac. 772], is decisive of the point now under discussion.

Judgment is affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 8, 1907, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 8, 1907.

[Civ. No. 330. First Appellate District.—February 8, 1907.]

F. A. ELLIOTT, Administrator of Estate of ADA M. HUDSON, Deceased, Respondent, v. CHARLOTTE K. CLARK, Special Administratrix of Estate of GEORGE HUDSON, Deceased, Appellant.

ENFORCEMENT OF TRUST—COMPLAINT—DEATH OF PARTIES—LACHES BARRING ACTION—GENERAL DEMURRER.—In an action by the administrator of a deceased wife against the administratrix of the deceased husband to enforce a trust, where the complaint shows that the trust arose out of a transaction occurring more than forty-five years before the action was begun, that there was no accounting between the parties, that an accounting would involve purchases and sales extending through more than forty-five years, and after their death, it is manifest that the court cannot do complete justice at so late a day, such laches appears upon the face of the complaint as to bar any right of action, and the defense thereof may be raised by general demurrer to the complaint, which it was error to overrule.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

M. C. Hassett, and D. H. Whittemore, for Appellant.

Wm. H. Chapman, and R. F. Mogan, for Respondent.

HALL, J.—Plaintiff, as administrator of the estate of Ada M. Hudson, deceased, brought this action against Charlotte K. Clark, as special administratrix of the estate of George Hudson, deceased, to obtain a decree that certain real property, the legal title to which was in said George Hudson at the time of his death, was acquired and held by him in trust for Ada M. Hudson, and for her estate since her death, and for an accounting of the rents, issues and profits of said property. Defendant demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and defendant now urges that the court erred in so doing, and we think this contention must be sustained.

The real point of the demurrer is that the complaint upon its face shows such laches on the part of plaintiff and his intestate as to bar any right of action upon the matters set forth as plaintiff's cause of action. That this defense may be raised by general demurrer to the complaint where the laches is apparent upon the face of the complaint is well settled in this state. (*Kleinclaus v. Dutard*, 147 Cal. 245, [81 Pac. 516]; *Bell v. Hudson*, 73 Cal. 285, [2 Am. St. Rep. 791, 4 Pac. 791].)

This action was commenced on the sixteenth day of June, 1899. It is alleged in the complaint that Ada M. Hudson and George Hudson intermarried on the twenty-first day of December, 1853, and continued to be husband and wife until the death of Ada M. Hudson, which occurred on the seventeenth day of May, 1897. George Hudson died March 12, 1898. It is further alleged that prior to the said marriage Ada M. Hudson did deliver to George Hudson the sum of about four thousand dollars to be invested for her by him. That he did, on the twenty-first day of November, 1853,

purchase a certain piece of real estate, and as a part of the purchase price thereof paid the said \$4,000, but took the title thereto in his own name. That he thereafter sold said property for \$13,000, and, with the consent of the said wife, invested the proceeds in real estate, and thereafter in various ways invested her money so that when he died he held in his own name several described pieces of real property. It is alleged: "That as a portion of the consideration for the conveyance to him of all of said real property so owned by him at the time of his death, the said George Hudson did pay and deliver the said moneys, and the accumulations thereof, of said Ada M. Hudson so delivered to him by said Ada M. Hudson in trust to invest the same for her use and benefit." In other words, it is charged that a portion of the property held by George Hudson, at the time of his death, was purchased with proceeds arising from the \$4,000 delivered to him by Ada M. Hudson in 1853.

It is further alleged that neither said George Hudson nor the defendant ever rendered an accounting "of such moneys received by said George Hudson as aforesaid."

It is thus seen that plaintiff is endeavoring to obtain the aid of a court of equity to establish and enforce a trust and claim growing out of a transaction that occurred more than forty-five years before the bringing of the action, the action being brought after both parties to the original transaction have died.

We think the facts set forth in the complaint bring this case within the rule laid down in *Kleinclaus v. Dutard*, 147 Cal. 245, [81 Pac. 516], where the defense of laches, raised by demurrer to a complaint to enforce an alleged trust growing out of a transaction thirty-five years old was sustained. In this latter case the suit was brought by the brother and sister of Hypolite Dutard, and the administratrix of the estates of the father and mother of said Hypolite Dutard, against the executors of the will of said Dutard. It was alleged that on the death of the father of said Dutard in 1865 he took possession and charge of a produce business of the father, in trust to manage and conduct the same for the benefit of his mother, brothers and sisters and himself. He managed the business until the death of the mother in 1875, and then again repeated his promises to manage and conduct the business and property for the benefit of his brothers and

sisters and himself. It was expressly alleged that "he never denied or repudiated said trust or his said agreements and promises, but always kept and lived up to them"; that "he did always—from his father's death until his death—admit and acknowledge his said promises, and that he always promised to account and pay over the respective shares whenever the same were demanded." It was also in terms alleged that he had never accounted or paid over to any of the beneficiaries anything except that he had in part supported his mother during her life. It appeared that from the proceeds of the original business Dutard accumulated a large fortune. It was held that a court of equity in such a case should refuse to entertain the action by reason of the laches of plaintiffs. It was there said: "Following the maxim that equity aids the vigilant and not those who slumber on their rights, it has been universally declared that only conscience, good faith and reasonable diligence can call a court of equity into activity, and that, entirely independent of any statutory period of limitations, stale demands will not be aided where the claimant has slept upon his rights for so long a time, and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof. Where such is the condition the demand is, in a court of equity, barred by laches. . . . The doctrine of laches may be invoked in every class of cases, even in the case of an express trust."

In the case at bar the alleged trust arose out of a transaction occurring more than forty-five years before the bringing of the action, which was brought after both parties to the original transaction were dead. The alleged trust arises out of the investment of \$4,000 belonging to Ada M. Hudson, who was then Mrs. Elliott, in a piece of property bought by George Hudson in his own name, and the entire purchase price of which is not given in the complaint. It is simply alleged that the \$4,000 was paid "as part of the purchase price of the said real property." If this were true, a resulting trust arose in favor of Ada M. Hudson to an interest in said property in the proportion that \$4,000 bore to the entire purchase price of the property.

It is next alleged that the property was subsequently sold for \$13,000, and the proceeds of such sale again invested by said George Hudson. Under the allegations of the complaint

some part of that \$13,000 was presumptively the property of George Hudson.

It is next alleged that George Hudson in various ways did invest the money of Ada M. Hudson, and was at the time of his death the owner of five several pieces of land, a portion of the purchase price of which was paid out of the money delivered by her to him, and the accumulations thereof.

From the whole complaint it is apparent that the court could only arrive at the respective rights of the parties by going into an investigation of the particulars of purchases and sales of property covering a period of over forty years. Both parties to the original transaction, out of which plaintiff's alleged claim arose, being dead, it is manifest that it would be practically impossible for a court at this late day to do complete justice. This is a ground for a court of equity to refuse relief. (Story's Equity Jurisprudence, sec. 1520a; *Kleinclaus v. Dutard*, 147 Cal. 245, [81 Pac. 516]; 18 Am. & Eng. Ency. of Law, 105.)

We think the complaint upon its face shows such laches as to bar any right of action in plaintiff, and the demurrer should have been sustained. The conclusion to which we have come on this point makes it unnecessary to discuss the question as to the sufficiency of the evidence to sustain the findings of the court.

The judgment and order are reversed and the cause remanded, and the court directed to sustain the demurrer.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 248. Third Appellate District.—February 9, 1907.]

ROBERT P. JANSEN, Appellant, v. SOUTHERN PACIFIC COMPANY, Respondent.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTION—APPLICABILITY TO EVIDENCE.—In an action to recover for injuries alleged to have been sustained by defendants' train while plaintiff was crossing the track, where the evidence clearly shows that if plaintiff and defendant were both negligent, their negligence was contemporaneous and concurrent, and extending up to the very time of the accident, an instruction to the effect that if the jury believe that plaintiff

did not exercise reasonable and ordinary care to prevent the injury he cannot recover, notwithstanding defendant's negligence, unless it was gross, willful and intentional, is not objectionable, for not using the words "proximate contributory negligence," nor for not stating the rule of "the last clear opportunity."

Id.—"PROXIMATE CONTRIBUTORY NEGLIGENCE"—DEFINITION.—"Proximate contributory negligence" is that negligence of plaintiff which in a natural and continuous sequence, unbroken by any independent cause, contributes to the injuries, and without which the injuries would not have occurred.

Id.—CONTRIBUTORY NEGLIGENCE OF TRAVELER CROSSING TRACK—FAILURE TO LOOK AND LISTEN.—It is the duty of a traveler when attempting to cross a railroad track to look and listen for an approaching train, and it is contributory negligence for him to expose himself to danger without making any effort to ascertain whether a train was approaching by which he was injured.

Id.—INSTRUCTIONS TO BE READ TOGETHER—PROXIMATE CONTRIBUTION.—Instructions are to be read together; and where an instruction was embodied in the charge as to the negligence of plaintiff, cautioning the jury that they must find whether "plaintiff was guilty of negligence which proximately contributed to his injuries," the omission of "proximate contributory negligence" in the particular instruction objected to was not prejudicial.

Id.—INAPPLICABLE INSTRUCTION—"LAST CLEAR OPPORTUNITY"—ACTUAL KNOWLEDGE OF PERIL ESSENTIAL.—An instruction as to the "last clear opportunity" was wholly inapplicable where there was nothing in the evidence to support it. It is essential to the applicability of the doctrine of later negligence of the engineer that he must have been actually aware of plaintiff's danger in time to have obviated it; and where the evidence shows that after his discovery of plaintiff's peril and inattention to danger the engineer did all he could to prevent the accident, no later negligence on his part existed.

Id.—INSTRUCTION AS TO WILLFUL INJURY NOT PREJUDICIAL.—Though defendant would have no right in any event to injure the plaintiff wantonly, willfully and with an intentional purpose to hurt him, and though an instruction on that subject might have been eliminated, owing to the fact that there was no issue or evidence as to wanton and intentional injury, its presence could not prejudice the appellant.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

D. M. Delmas, and Gibson & Woolner, for Appellant.

P. F. Dunne, for Respondent.

BURNETT, J.—This is an action for damages. It was occasioned by serious personal injuries received by appellant at Encinal station, Alameda, on the railroad of respondent, and which were due, so it is alleged, to the negligence of respondent in running its train "at an improper and negligent rate of speed and at an improper and negligent point of time without notice of warning of any kind whatever, and so negligently that it ran upon said plaintiff and threw him to the ground."

The case is somewhat unique in this, that no objection by either party was made to any of the testimony; only five simple instructions were requested by appellant, and three by respondent; without substantial modification they were all given by the court and the verdict of the jury was in favor of the corporation.

By the learned counsel for the appellant only one point is deemed sufficiently vulnerable to merit attention and invite attack. With commendable brevity and simplicity it is urged that prejudicial error was committed by the court in giving the following instruction: "I instruct you that it was the duty of the plaintiff to have a reasonable regard for and pay such reasonable attention as a reasonable man under such circumstances should pay to the preservation of his own life and limb, and if the jury believe from the evidence that he did not on that occasion exercise such reasonable and ordinary care as the average reasonable man would exercise under like conditions, he cannot recover in this action, whatever may have been his injuries, or whatever the negligence of the defendant, unless the negligence of the defendant was gross, willful and intentional and exhibited an intentional purpose to hurt him." It is suggested that this instruction is open to two objections—that is, in attempting to state the rule of contributory negligence the essential element of "proximate" contribution has been omitted, and again, that it takes no account of the doctrine of the "last clear opportunity," or, as aptly expressed by appellant's counsel: "It tells the jury, in effect, that, even though the engineer discovered the plaintiff in time to have avoided injuring him by the use of ordinary care, yet, he was not guilty of actionable negligence, though he failed to use such care, unless he purposely ran over him, with the intention of hurting him."

In support of each objection one authority is cited, and no

fault can be found with the doctrine of either. The first is found in Deering's Digest, volume 2, page 2058, No. 123, and is as follows: "The rule releasing a defendant from responsibility for damages because of the negligence of the plaintiff is limited to cases where the act or omission of the plaintiff is the *proximate* cause of the injury." It is hard to conceive of any authority holding differently. In support of the second objection appellant invokes the case of *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, [98 Am. St. Rep. 85, 74 Pac. 15], wherein it is declared that "no purpose or design . . . to injure was essential to defendant's liability."

In the consideration of the first objection is involved the significance of the expression, "proximate cause." The term scarcely needs definition, as it is so familiar to the profession. Shearman and Redfield, in their work on Negligence, section 26, however, declare that "the proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new independent cause, produces that event, and without which that event would not have occurred." "Proximate contributory negligence," then, must be that negligence which "in a natural and continuous sequence, unbroken by any new independent cause," contributes to the injuries and without which the injuries would not have occurred. But it is apparent from the evidence in the case that the occasion did not demand the definition of "proximate contributory negligence," and it is equally obvious that the omission from the instruction of the word "proximate" or its equivalent could not have prejudiced the appellant. This is indubitably so because there could be no controversy as to whether appellant's "contributory negligence" was proximate or not. The evidence all shows that appellant's negligence, assuming it to exist, continued up to the very moment of the accident, "unbroken by any new independent cause and without which that event would not have occurred." This is manifest from the testimony of appellant himself. In his account of the accident he says: "I boarded the first car, the smoking car—next to the tender. I was going to the city. After I got on the platform I turned around and saw my wife; she made a motion with her hand, as I understood to recall, signaling to come back. . . . My intention was to come down again the way I came up on that platform, but there were people getting on there still, so I

stepped off on the other side, the north side of the train. . . . My purpose was to go to the sidewalk and wait until that train had withdrawn from the station and go to my wife and see what she required of me when she recalled me. . . . The train was headed toward the west, and I was turned northeast with my back toward the engine. I was going to the northeast corner of Lafayette street and Encinal avenue. In order to do that I had to cross the northerly track. The northern and southerly tracks are 11.95 feet apart. During the six years I had traveled there I had observed that the trains never met there at the station, according to a rule of the company of which I had read, that the train would not pass on the double track in Alameda, at stations. After stepping off the car I was not conscious of anything; I didn't even feel the blow. As I got off to cross that track on the northerly side of the train I was leaving I did not turn at all in the direction in which the train might be coming from the mole. I stepped down with my back in that direction. *I did not stop to look or listen or to see* if any train was coming. I may have taken two or three steps. I couldn't say whether I got to the track, whether I was between the rails or at the side of the track. I think I got hit almost immediately after I got off the train."

From the foregoing account it could be argued plausibly that at any moment from the time he left the train until he was struck, plaintiff could have avoided the accident by the use of ordinary caution—such caution as "a person of ordinary prudence would use for his own protection under the same circumstances, in view of the danger to be avoided." That plaintiff's negligence was the "proximate" contributing cause of the injury is not open to discussion, if he was guilty of any negligence at all. That he was actively at fault in voluntarily exposing himself to danger without making any effort to ascertain whether a train was approaching from the opposite direction seems established by the weight of authority. The doctrine of the cases is embodied in the following quotations from Shearman and Redfield, section 476: "It is a rule of almost invariable application that a traveler who knows or is bound to know that he is about to cross the track of a railroad, upon which trains may lawfully run at greater speed than ordinary vehicles upon highways, must look and listen for approaching trains before even attempt-

ing to cross the track. He must do this every time that he crosses the track, even if he goes to and fro. He should in this manner make sure that the crossing is safe and clear before using it. He ought not to take any chances. A traveler must look in every direction from which engines could possibly come. . . . *One who stands or lingers on the track must continually look and listen.* . . . It is no excuse for failure to look and listen that the traveler did not think, just then, about the railroad or its dangers, or that his attention was diverted by some trivial matter, or that he believed that all trains stopped short of the crossing, or that no regular train was due, or that a train had recently passed, or that the usual or statutory signals of approaching trains were not given."

The decisions of our supreme court are to the same effect. (*Holmes v. Southern Pac. C. Ry. Co.*, 97 Cal. 161, [31 Pac. 834]; *Bailey v. Market St. Ry. Co.*, 110 Cal. 323, [42 Pac. 914]; *Everett v. Los Angeles etc. Ry. Co.*, 115 Cal. 105, [43 Pac. 207, 46 Pac. 889]; *Sego v. Southern Pacific Co.*, 187 Cal. 405, 406, [70 Pac. 279].) Hence with some reason defendant might have contested the propriety of submitting to the jury at all the question of negligence. However, in view of the conflict in the evidence as to whether respondent transgressed its rule in reference to trains passing at the station and as to whether the usual signals were given, and keeping in mind the testimony of appellant that he relied upon said rule, it may have been proper to allow the jury to determine whether under all the circumstances appellant was chargeable with such contributory negligence as to preclude recovery. But assuredly no question could arise as to whether that "contributory negligence" was proximate or otherwise. Again, the instructions must be read together, as the authorities hold, and it is not necessary for one to contain all the elements when the omission is supplied by other instructions. What the court meant by the negligence of plaintiff is shown by four instructions given at the request of plaintiff. They conclude with this caution: "unless you further find that the plaintiff was guilty of negligence which proximately contributed to his injuries." There could have been on the subject no misunderstanding in the minds of the jurors.

What has been said will apply in part to the further animadversion of appellant. There was no room for the application of the doctrine of "earlier and later negligence," or, as some of the decisions express it, "of the last clear opportunity." The negligence of plaintiff and the negligence of defendant, assuming them to exist, were, without controversy, contemporaneous and concurrent and extending up to the very time of the accident. And if we are to apply the strict doctrine of *Everett v. Los Angeles Co.*, 115 Cal. 128, [43 Pac. 207, 46 Pac. 889], the rule could not apply because of the continuing neglect of plaintiff and his ability at any moment up to the time of the accident, by the exercise of the slightest care and effort, to put himself out of danger. But to justify the instruction of which complaint is made it is not necessary to go to the limit of the *Everett* case. It is sufficient to say that there was no evidence of any last clear opportunity, or to show that the negligent acts of the parties were distinct and independent of each other and that the engineer could have stopped the train after knowing of plaintiff's danger. Indeed, as a complete answer to appellant's contention, it is submitted that all the evidence shows that the engineer, after his discovery of plaintiff's dangerous situation, notwithstanding his right to assume that plaintiff would avoid the accident, did all that he could to prevent it. The only evidence that could arouse a suspicion to the contrary is found in the testimony of one R. S. Wheeler, an apparently honest witness, who thinks that when plaintiff stepped upon the track the train was twenty or thirty or fifty feet away. This, however, is merely a guess on his part. In this connection it must be remembered that the doctrine of later negligence rests upon the assumption that the engineer must have been actually aware of plaintiff's danger in time to obviate it and not upon the proposition that by the exercise of more or less diligence he might have discovered plaintiff's peril earlier. (*Herbert v. Southern Pacific Co.*, 121 Cal. 227, [53 Pac. 651]; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, [98 Am. St. Rep. 85, 74 Pac. 15].) The latter case, cited by appellant, affords him no comfort. In that case there was evidence of a "last clear opportunity," and that deceased, realizing his danger, made an earnest effort to escape. The court there, nevertheless, declares that the liability of defendant for his failure to exercise ordinary care to avoid injury to

plaintiff who is himself negligent, arises only when he discovers plaintiff in a dangerous position and under such circumstances as preclude the assumption that the injured party *will or can* get out of the way. Of course, in any event, the defendant would have no right to injure the plaintiff wantonly, willfully and with "an intentional purpose to hurt him," but in view of the fact that in the case at bar there was no evidence and no issue raised as to any wanton and intentional injury, this feature might have been eliminated from the instruction in question, but its presence there could not possibly injure appellant.

The judgment and order denying the motion for a new trial are affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 294. First Appellate District.—February 16, 1907.]

P. R. LEONHART, Respondent, v. CALIFORNIA WINE ASSOCIATION, Appellant.

ACTION FOR BREACH OF CONTRACT—PURCHASE OF GRAPES—DIFFERENT KINDS AND PRICES—PLEADING—SHRINKAGE IN WEIGHT—DEMURRER FOR UNCERTAINTY—HARMLESS ERROR.—In an action to recover damages for breach of a contract to purchase grapes of different kinds and prices, where damage was claimed for rejection of one kind and loss on resale, and also for shrinkage in weight by reason of delay in acceptance of the grapes at maturity, of over forty-five tons, a demurrer for uncertainty in not stating what shrinkage occurred in each kind of grapes at a designated price should have been sustained; but where it appeared in evidence at the trial that the shrinkage was in only one kind of grapes delivered, the error was harmless, and not ground for reversal of a judgment for plaintiff.

ID.—UNCERTAIN PLEADING LIKE OTHER ERROR AFTER TRIAL.—The same rule applies to errors in overruling demurrers for uncertainty in pleading, after trial of the issues, that applies to the errors of the court. The error must be not merely abstract, but must be prejudicial and injurious, to avail the appellant, otherwise he has no cause for complaint.

ID.—TERMS OF CONTRACT AS TO DELIVERY OF GRAPES—INCONSISTENT DEFENSE OF CUSTOM—PAROL EVIDENCE INADMISSIBLE.—A custom as to the delivery of grapes in small installments, which is inconsistent with the terms of the written contract for their delivery, constitutes no defense to the action for its breach; and the contract being certain in its terms, parol proof of usage is not competent to vary it.

ID.—JURY TRIAL—REQUEST FOR SPECIAL VERDICT—REFUSAL—ERROR NOT SHOWN—PRESUMPTIONS UPON APPEAL.—Where, upon the trial of the action by jury, defendant requested a special verdict, which was refused, and the record upon appeal fails to specify upon what issues it was requested, no error is shown in the refusal. Error will not be presumed upon appeal; but all intendments are in favor of the regularity of the action of the trial court.

ID.—EVIDENCE—DELAY OF OTHER PERSONS IN DELIVERY OF GRAPES.—Evidence on the part of the plaintiff to show that persons other than the plaintiff were delayed in the delivery of their grapes was admissible, not to show that plaintiff was also delayed, but to show the congested condition and lack of facilities at the winery of the defendant for accepting grapes.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. George E. Church, Judge.

The facts are stated in the opinion of the court.

Pillsbury, Madison & Sutro, and Johnston & Jones, for Appellant.

The complaint was uncertain, and the court erred in overruling the demurrer. (*Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757; *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623.) The custom as to the delivery of the grapes was a proper defense, and the defendant should have been allowed to prove it. (12 Cyc. 1082, and cases cited.) The test is whether, if the custom had been written into the contract, it would render it insensible or inconsistent. (12 Cyc. 1092; *The Alida*, 1 Abb. Adm. 171; *Rendenau v. Bullock*, 147 N. Y. 269, 41 N. E. 561; *Ah Tong v. Earl Fruit Co.*, 112 Cal. 679, 45 Pac. 7; *McKeefrey v. Connellsville*, 56 Fed. 42, 5 C. C. A. 482; *Robinson v. United States*, 13 Wall. 363, 20 L. Ed. 653.) The court erred in refusing the written request for a special verdict in writing upon issues specified therein. The court must

grant such request. (Code Civ. Proc., sec. 625, as amended 1905.)

L. L. Cory, for Respondent.

Under the proofs at the trial, any error in overruling the demurrer for uncertainty appears not prejudicial. (*Holland v. McDade*, 125 Cal. 353, 58 Pac. 9; *Stephenson v. Deuel*, 125 Cal. 656, 58 Pac. 258; *Alexander v. Central Lumber Co.*, 104 Cal. 536, 38 Pac. 410.) The contract was definite and certain as to terms and could not be varied by evidence of usage or custom. (*Withers v. Moore*, 140 Cal. 591, 74 Pac. 159; *Corwin v. Patch*, 4 Cal. 204; *Polhemus v. Heiman*, 50 Cal. 438; *Ah Tong v. Earl Fruit Co.*, 112 Cal. 679, 45 Pac. 7; *Hughes v. Bray*, 60 Cal. 284; *Moran v. Prather*, 23 Wall. 499-501, 23 L. Ed. 121; *Partridge v. Insurance Co.*, 15 Wall. 579, 21 L. Ed. 229; *Bernard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987.) No error appears in the record as to the refusal of the request for a special verdict and error cannot be presumed. (*Sheehy v. Shirm*, 103 Cal. 325, 37 Pac. 393; *In re Yoakam*, 103 Cal. 503, 37 Pac. 485; *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400; *McLennen v. Wilcox*, 126 Cal. 51, 58 Pac. 305.)

KERRIGAN, J.—This is an action brought by the respondent against the appellant to recover damages, claimed to have been sustained by respondent through the failure of appellant to carry out the terms of a contract for the purchase of grapes.

The amended complaint alleges that respondent delivered to appellant a certain quantity of different kinds of grapes specified in the contract, and by reason of the delay of appellant in accepting the grapes as they matured, a large portion of the grapes which were delivered had shrunk in weight to an amount exceeding forty-five tons; that a portion of the grapes, the Malagas, was rejected altogether; that the Malaga grapes were then sold for the highest market price, and the appellant charged the difference between the amount actually realized and the contract price.

The action was tried before a jury, which rendered a verdict in favor of the plaintiff. The appeal is from the judg-

ment, and from the order denying defendant's motion for a new trial.

Appellant demurred specially to the amended complaint on the ground that it could not be determined therefrom what portion of the shrinkage in an amount exceeding forty-five tons occurred in the Zinfandel grapes delivered, what portion occurred in the Burger grapes delivered, what portion occurred in the Faher Zagors grapes delivered and what portion occurred in the Sultana grapes delivered. The contract fixes the price for each of the first three kinds named at \$16 a ton, and that of the last kind named at \$15 a ton. Had the price to be paid for each variety of grapes been the same it would have been immaterial how the shrinkage was distributed. The complaint is uncertain in the respect pointed out in the demurrer, and it should have been sustained. The error, however, is highly technical, and concerns a mere trifle in amount. Only a very small proportion of the loss could have been in the \$15 a ton variety, for the complaint shows that but a little over three tons of that variety were delivered, and then again the evidence discloses that the shrinkage was in the Zinfandels alone. The error is harmless, and does not affect the case. The court will not reverse a judgment for such an error. In the case of *Alexander v. Central L. & M. Co.*, 104 Cal. 536, [38 Pac. 410], it is said: "It is not in all cases where error has been committed by trial courts in overruling demurrers to complaints upon the grounds of ambiguity or uncertainty, that this court will order a reversal of a judgment based upon a trial of the issues made by the complaint and answer. The same rule applies to errors of this character as is invoked as to all other errors of the court. It must not be a mere abstract error, but it must be prejudicial and injurious error in order to avail appellant; otherwise he has no cause of complaint." (See, also, *Holland v. McDade*, 125 Cal. 353, [58 Pac. 9]; *Stephenson v. Dewey*, 125 Cal. 656, [58 Pac. 258].)

The appellant in its answer set up as a special defense that the crushing capacity of the winery at which these grapes were to be delivered did not exceed one hundred tons per day, and that the amount of grapes which might be delivered at the winery under ordinary conditions was in excess of nine thousand tons during a season lasting usually about ninety days; that because of the impossibility of hand-

ling at the winery at one time all the grapes of one season, it was known and understood by all persons delivering grapes, including respondent, to be customary for each person to deliver each day at the winery only such proportion of the daily capacity of the winery as all the grapes to be delivered by each individual for each season bore to the whole amount of grapes to be delivered to the appellant during such season; that this custom was well known to respondent at the time of entering into the contract, and constituted one of the conditions thereof, and that it was in accordance with this custom that appellant notified respondent not to deliver his grapes at the winery during the season of 1904 at a greater rate than one or two loads per day. The contract provides that respondent will sell and deliver his grapes at certain prices, etc., "and payment will be made as the grapes are delivered." The trial court took the view that these allegations did not constitute a defense to the written contract sued on by respondent. Under the terms of the contract, respondent could make as many deliveries within a given time, say a day, as he pleased, and upon delivery he was entitled to payment. The written contract makes no limitation as to deliveries. The alleged custom would have limited the deliveries to one or two loads a day, and in that respect would have been inconsistent with the written contract. A custom inconsistent with the terms of a written contract is not the proper subject matter of a defense. In the case of *Withers v. Moore*, 140 Cal. 591, [74 Pac. 159], the defendant contended that the contract sued upon was subject to a certain custom. In that case, pages 596, 597 of 180 Cal. [pages 160, 161, 74 Pac.], it is said: "The contract as made by the cablegrams and explained in the letter is not uncertain with respect to that point in question. It is a positive agreement by the defendant to buy the coal in question of the plaintiff at the price of twenty-four shillings and three pence per ton, to be delivered to him free of any expense of freight, insurance, exchange or duty, all of which were to be paid by the plaintiff. To attach to this contract the custom of San Francisco, the effect of which would be that if the cargo was not received until after July 1st, 1894, the defendant would pay thirty-five cents less per ton than the price agreed upon, would be to vary the terms of a written contract by parol evidence. The Code provides

that evidence may be given of 'usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation.' (Code Civ. Proc., sec. 1870, subd. 12.) And in accordance with this principle it has been held that it is not competent to vary a written contract by parol proof of a custom where the contract is certain in its terms. (*Holloway v. McNear*, 81 Cal. 156, [22 Pac. 514]; *Milwaukee Co. v. Palatine Co.*, 128 Cal. 74, [60 Pac. 518]; *Ah Tong v. Earl Fruit Co.*, 112 Cal. 681, [45 Pac. 7]; *Burns v. Sennett*, 99 Cal. 363, [33 Pac. 916].)"

The appellant urges that the trial court should have submitted to the jury certain special issues requested by it. Upon this point the bill of exceptions shows only this: "The defendant California Wine Association requested the court in writing to direct the jury to find a special verdict in writing upon certain issues in the case specified in such written request, but the court declined to direct the jury to find a special verdict in writing upon all or any of the issues as requested by this defendant, and this defendant duly and regularly excepted to the failure of the court to so instruct the jury." The record fails to specify what the request was or upon what issues the appellant desired a special verdict. It fails to point out any error. Error will not be presumed, all intendments being in favor of the regularity of the action of the trial court. (*Sheehy v. Shinn*, 103 Cal. 325, [37 Pac. 393]; *In re Yoakum*, 103 Cal. 503, [37 Pac. 485]; *Rudel v. Los Angeles Co.*, 118 Cal. 281, [50 Pac. 400]; *McLennon v. Wilcox*, 126 Cal. 51, [58 Pac. 305]; *People v. Clark*, 121 Cal. 633, [54 Pac. 147].)

The plaintiff was permitted, over the objection and exception of the defendant, to show that persons other than the plaintiff were delayed in the delivery of their grapes. To take the testimony of one witness by way of example, speaking of deliveries, T. R. Chipman said: "My experience was I got from one to two loads; very seldom two loads. . . . I saw 36 teams delivering there. I didn't stay there night and day. I left my wagon and would go there next day with my team, and get in; if I couldn't I would wait all day and go back home at night again, and go again. That is the way I got my grapes delivered. That was the condition as long as I was there. I had to get a number from the office. Each

man went in in rotation in accordance with the number he got from the office. They would not accept them in any other way." The testimony was not admitted to show that because others were delayed in the delivery of their grapes, plaintiff was also delayed. It was admitted to show the congested condition and lack of facilities at the winery for accepting grapes.

It is claimed the court erred in other of its rulings on the admission of evidence, and that it erred in the rejection of certain evidence, and in a motion to strike out certain testimony. We have examined the rulings, and are of the opinion that no error was committed regarding them.

The judgment and order are affirmed.

Cooper, P. J., and Hall, J., concurred.

[Civ. No. 840. Second Appellate District.—February 18, 1907.]

WILLIAM RILEY, Respondent, v. THE LOMA VISTA RANCH COMPANY, Appellant, and W. W. HOWARD and W. L. RILEY, Codefendants.

NEW TRIAL—APPEAL FROM ORDER—INSUFFICIENCY OF EVIDENCE—EFFECT OF REVERSAL.—A reversal by the appellate court of an order denying a new trial, on the ground assigned, that the findings were not justified by the evidence, has the effect to award to the parties a new trial. The parties occupy the same position under such reversal as though no trial had ever been had. The case is before the court below for trial *de novo* of all issues of fact, upon such proper amendments to the pleadings as the court may allow; and the parties have the right, upon the new trial, to introduce any and all competent evidence.

ID.—ERRONEOUS JUDGMENT UPON MOTION, WITHOUT TRIAL—FORMER JUDGMENT AGAINST CODEFENDANTS.—Where the superior court, after the going down of the *remittitur*, awarded judgment in favor of the respondent against the appellant upon motion, based upon a former judgment rendered in his favor against codefendants of the appellant, without any trial or findings of fact against the appellant, the judgment is erroneous and must be reversed.

ID.—ABSENCE OF FINDINGS NOT WAIVED—JUDGMENT NOT SUPPORTED—RIGHT OF APPEAL NOT WAIVED.—There being no findings and no

waiver of findings, the judgment is unauthorized. It cannot be deemed supported by the former findings set aside upon reversal. The mere failure of appellant's counsel to object to the procedure adopted by the court did not have the effect to waive the right of the appellant to appeal from the erroneous and unsupported order and judgment rendered against appellant upon motion, without the new trial allowed by this court.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank F. Oster, Judge Presiding.

The facts are stated in the opinion of the court.

Barstow & Variel, for Appellant.

Will D. Gould, and James H. Blanchard, for Respondent.

SHAW, J.—The appellant issued to one Howard its warehouse receipt for a quantity of hay. A part of the hay had been delivered when, by assignment, the respondent acquired title to this receipt, demanded the balance of the hay, and upon failure to deliver the same instituted suit against the Loma Vista Ranch Company for the value thereof, making as parties defendant in said suit Howard and one W. L. Riley, who was respondent's immediate assignor. Upon the trial he obtained judgment against Howard and W. L. Riley, but as against the Loma Vista Ranch Company it was adjudged that plaintiff's (respondent's here) complaint be dismissed and that said company have judgment for its costs. The respondent moved for a new trial, which motion was, by order of court, denied, and on his appeal therefrom, this order was reversed without any qualification. (*Riley v. Loma Vista Ranch Co.*, 1 Cal. App. 488, [82 Pac. 686].)

On November 24, 1905, and after the *remititur* had been filed in the superior court, judgment was rendered on motion in favor of respondent William Riley, and against the Loma Vista Ranch Company, and from this judgment the latter appeals on the judgment-roll.

The order of reversal was general and not qualified by any specific direction, the ground assigned therefor being that the findings were not justified by the evidence.

The effect of this reversal was to award to the parties a new trial of the case. (*Falkner v. Hendy*, 107 Cal. 49-54,

[40 Pac. 21, 386]; *Myers v. McDonald*, 68 Cal. 163, [8 Pac. 809]; *Irwin v. Towne*, 43 Cal. 23; *Kellogg v. King*, 114 Cal. 378, [55 Am. St. Rep. 74, 46 Pac. 166].)

The position occupied by the parties was identically the same under this reversal as though no trial had ever been had. "A new trial is a re-examination of any issue of fact in the same court after a trial and decision by a jury or court, or by referees." (Code Civ. Proc., sec. 656.) They were left free to make such proper amendments to the pleadings as the trial court might allow, and upon the trial to introduce any and all competent evidence. The case was before the court for trial *de novo*. (*Heidt v. Minor*, 113 Cal. 385, [45 Pac. 700].)

It appears that no trial within the meaning of said section 656, Code of Civil Procedure, was ever had. The judgment from which the appeal is taken recites that the cause came on to be heard "on plaintiff's motion for judgment against defendant Loma Vista Ranch Company, a corporation, upon *re-mittitur* from the district court of appeals"; that the parties were present in court by counsel; the rendition of the former judgment; motion for new trial and order denying same, and that on appeal the same was reversed; and "it appearing to the court that all questions of fact in said cause were determined and finally adjudicated by judgment heretofore entered against W. W. Howard and W. L. Riley, and good cause being shown therefor, and no objection being made thereof, it is ordered," etc. It thus appears that there was an entire absence of the procedure necessary in a re-examination of the issues of fact joined by the pleadings. No findings were made, and in view of the recitals in the judgment, we cannot, in aid thereof, indulge in the presumption that they were waived. (*People v. Forbes*, 51 Cal. 628.) The findings made upon the former trial were brought up in the transcript, but the facts then found by the court supported, not this judgment, but the former judgment, and embodied the decision, which this court then held was not justified by the evidence.

The fact that counsel for appellant did not object to the procedure cannot be construed as consent thereto. Failure to object was not a waiver of its rights to appeal from any erroneous order or judgment.

Respondent insists that the transcript does not contain the notice of motion made for judgment. This is no part of the judgment-roll, and further, appellant not only concedes that the notice was served, but makes no point on account of its absence.

It is apparent that the judgment was rendered through misapprehension and inadvertence of both the respondent and the court, and that counsel for appellant did not conceive that the interest of their client demanded that they enter any objection to the procedure. Want of criticism should not be construed as commendation of the position assumed by appellant in this behalf.

It is urged that the trial court should now be directed to enter judgment for appellant on the findings made on the former trial. Section 657, Code of Civil Procedure, provides that, "the former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: . . . 6. Insufficiency of the evidence to justify the verdict or other decision." This court in its opinion on the former appeal held that the findings upon which appellant now bases its claim for a judgment were not justified by the evidence and reversed the order of the trial court denying the motion for a vacation of the decision and, in effect, ordering that a new trial be granted. These findings having been set aside, and the record excluding the presumption that any were waived, and none other having been made in any subsequent trial, it follows that there are no findings to support any judgment.

The judgment is reversed and the cause remanded for a new trial, as heretofore ordered.

Allen, P. J., and Taggart, J., concurred.

[Crim. No. 44. Second Appellate District.—February 18, 1907.]

THE PEOPLE, Respondent, v. STEVEN HARBEN, Appellant.

CRIMINAL LAW—PASSING FICTITIOUS BILL OF NONEXISTENT BANK—

SUFFICIENCY OF INFORMATION.—An information which charges the defendant with passing a fictitious bill of a bank not in existence with intent to cheat and defraud the complaining witness, and with knowledge of the false and fictitious character of the bill and of the nonexistence of the bank named in the bill at the time he passed the bill, sufficiently sets forth every essential element of the offense for which punishment is provided in section 476 of the Penal Code.

15.—SUFFICIENCY OF EVIDENCE—IMMATERIAL FACTS—ORIGINAL GENUINENESS—INCOMPLETENESS.—Evidence showing that the bill as

passed by defendant was double, and that the two bills as pasted together were in effect a simulation of a current bank note, and were evidently prepared with the purpose of concealing their real character, and as passed were not "genuine," but were "false" bills of a nonexistent bank, and were intended to defraud and deceive the complaining witness, and had that effect, is sufficient to warrant the jury in convicting the defendant. In view of such evidence, it is not material whether the bills may have been originally genuine when they left the bank, nor whether they were originally incomplete and illegally issued.

16.—EVIDENCE—SIMILAR CRIMES—KNOWLEDGE OF CHARACTER OF BILL—

FRAUDULENT INTENTION—SYSTEMATIC SCHEME.—Evidence of similar crimes to show knowledge of the character of the bill alleged to have been fraudulently uttered must be confined to prior passage of other fraudulent bills; but on the question of fraudulent intention, and to show a systematic scheme to defraud, similar offenses subsequent to the utterance of the bill in question may be proved.

17.—REMOTENESS OF EVIDENCE—DOCTRINE OF PROBABILITIES—QUESTION

FOR COURT.—Conceding that the evidence of similar offenses is based upon the doctrine of chances or probabilities, their remoteness in time and similarity of the instrument become matters affecting the weight rather than the admissibility of the evidence. If the evidence has any application under the rule, whether or not it has sufficient weight to entitle it to be submitted to the jury is a question for the determination of the trial court.

18.—QUESTION OF ALIBI—PROOF OF SUBSEQUENT OFFENSE—IDENTITY.—

If the evidence of another offense tends to establish an intent to defraud, and is admissible for that purpose, it will not be rejected merely because it may also tend to prove the identity of the per-

son who committed the crime being tried; this rule is not affected by the fact that the defense is an alibi.

ID.—CONSTRUCTION OF PENAL CODE—AMENDMENT.—The amendment of section 470 of the Penal Code in 1895 did not affect section 476 thereof, under which the defendant was prosecuted.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial, B. N. Smith, Judge.

The facts are stated in the opinion of the court.

E. L. Hutchinson, Henry H. Roser, and H. H. Appel, for Appellant.

U. S. Webb, Attorney General, and E. E. Selph, Deputy Attorney General, for Respondent.

TAGGART, J.—This is an appeal from a judgment of conviction, and from an order denying defendant's motion for a new trial, upon a charge of passing a fictitious bank bill in violation of the provisions of section 476 of the Penal Code.

The information charges that the defendant on the twenty-eighth day of October, 1905, passed a certain fictitious bank note of a bank or corporation having no existence at that time; and charges the defendant with knowledge of the false and fictitious character of the bill, and of the nonexistence of the bank named in the bill at the time of the passing of the bill.

The note or bill is double, that is, it consists of two bills pasted together, the exposed sides being similar to each other and the reverse side of each bill being entirely concealed from view. Both bills are of the denomination of twenty dollars and purport to have been issued by the State Bank at New Brunswick, state of New Jersey. One of the exposed faces bears the "No. 31777" and the date 1864; the other shows the number blank (No. —) and the date (18—) incomplete. Both are signed "John B. Hin, l'rest," but the space preceding the word "Cash'r" is blank (— Cash'r).

The bank named in the bill closed its doors, or as one witness put it, "busted about 1864 or 1865." It has had no existence either as a bank of issue, or otherwise, since 1865.

The bills constituting the "bill" are worthless and have had no value since the date last mentioned, except a nominal one given them by curio dealers. The absence of the name of the cashier indicates that they were never regularly issued and never became current bank notes or possessed any value as such.

These two bills, so made into one, were on the twenty-eighth day of October, 1905, tendered by defendant to the complaining witness, as \$20 in lawful money, in payment of the sum of \$3, being in part payment for rent of a room in the lodging-house kept by such witness at Long Beach. She accepted the bill as such payment and returned to defendant \$17 in good money in change. Defendant immediately left and said witness did not see him again until ten days later, when he was under arrest in San Pedro.

In addition to defendant's said conduct tending to show his knowledge of the character of the bill in question, the prosecution introduced in evidence two other bank notes or bills of the denomination of \$10 each (made into one in similar manner), purporting to have been issued by the Merchants' & Planters' Bank of the state of Georgia at Savannah; also testimony to show the passing of these bills by defendant, as a \$10 bank note, in payment for a loaf of bread worth ten cents, at San Pedro, on the third day of November, 1905, and that the bank named in these bills passed out of existence about the time of the close of the Civil War. The testimony shows that in connection with the latter bills defendant received in return as change the sum of nine dollars and ninety cents lawful money.

The ruling of the trial court in admitting the latter bills to show guilty knowledge and intent is assigned as error.

The record discloses no attack upon the information, either by demurrer or motion in arrest of judgment.

The appeal presents three matters for consideration: Does the information state a public offense? Is the evidence introduced sufficient to sustain a verdict of guilty? And, Did the court err in admitting in evidence the bills passed by defendant in San Pedro, and the testimony in connection therewith introduced to show that he did pass them and to show the character of the bills?

Every essential element of the offense for which punishment is provided by section 476 of the Penal Code is set forth in

the information. It charges the defendant with passing a fictitious bill in writing, of a bank not in existence, with the intent to cheat and defraud the complaining witness, and alleges that the defendant had knowledge of the character of the bill and of the nonexistence of the bank named in the bill at the time he passed the latter. This is sufficient.

Defendant contends that there is no evidence to show that the bills are "fictitious," but that, on the contrary, all the evidence in this respect tends to show that they were "genuine" in so far as they were complete, and that the bank was in existence at the time they bear date. Again, it is urged, that the bill or bills not having been properly executed, and this appearing upon the face or faces thereof, it, or they, could not be the means of committing a fraud.

Webster defines "fictitious" as "feigned, imaginary, not real, counterfeit, false, not genuine." If it were the duty of the court to divorce these bills from the circumstances under which they were passed by defendant, separate them from each other and restore them to the condition in which they probably were when they left the bank whose name they bear, it might find them to have been genuine at that time, but as prepared by defendant, or someone else, with the evident purpose of concealing their real character, and as passed, they were "not genuine," but were "false," and instruments of fraud and deceit, and the jury were justified by the evidence in so finding.

It is not material to the question that the bills were not complete and legally issued. As appears from language quoted by the supreme court with approval in *People v. Munroe*, 100 Cal. 667, [38 Am. St. Rep. 323, 35 Pac. 326], "It is a matter of perfect indifference whether it possesses or not, the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether upon its face it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over."

The language here used was in relation to forged paper which might injure either the person imposed upon by its

passage or the person whose name was forged. By the passing or utterance of a bank note of a nonexistent bank no one would be injured except the person receiving it as a thing of value and those to whom he might deliver it in the same manner. No question of the liability of the person whose signature is attached can arise. It becomes unimportant to know who signed it or whether or not it was signed at all. As pasted together the two bills were in effect a simulation of a current bank note and intended to deceive. They accomplished this purpose with the complaining witness. Being false, fictitious and "not genuine," the only test of whether or not the passage of this "bill" was a crime was the intent to defraud on the part of the defendant.

The practice of permitting the introduction of evidence to prove other or similar offenses to show knowledge, intent, design or system in cases of conspiracy, counterfeiting and forgery, false pretenses or representations, receiving stolen goods, embezzlement, etc., has long been recognized by the criminal courts. (Roscoe's Criminal Evidence, 6th ed., p. 88; Wharton's Criminal Evidence, 8th ed., sec. 39 et seq.; *People v. Gray*, 66 Cal. 275, [5 Pac. 240], and cases cited.)

Some confusion exists in the cases as to the principle upon which such evidence has been admitted. A recent treatise on evidence (Wigmore on Evidence), by a classification of the cases on the basis of the purposes which the evidence is intended to serve, has dispelled some of the fog which envelops the declarations of the courts on the subject.

A distinction holding that facts admitted to show knowledge should contain an element of notice or warning, while those to establish intent need only to negative inadvertence or other innocent explanation of the act, appears at first sight purely academic; but in the consideration of apparently conflicting opinions, by ascertaining the view point of the court expressing the opinion, it greatly aids in reducing the apparent inharmony among the cases.

The knowledge to be considered here is that which refers to the character of the bill charged by the information to have been fraudulently uttered. In order that the utterance of another fraudulent bill should be evidence of such knowledge on the part of the defendant it must have been uttered prior to the time of the passing of the bill in question. The intent

with which the bill was passed, as distinguished from the knowledge of the passer, however, opens a broader field. It includes the knowledge of the character of the bill and also the purpose with which the act was done. While the subsequent utterance could not establish notice at the prior date, it might, nevertheless, throw some light upon the intent and purpose which actuated the utterer at the time of the passing of the first bill.

The same distinction may also be drawn between the facts constituting design and those establishing system. A design implies a preconceived plan or preparation, while system may be established by any facts showing a general intent coupled with similarity of method or arrangement. While a preconceived plan could not well be inferred from subsequent events, a general system might be deduced from a line of conduct preceding or following the principal event.

A system being established, it would matter little whether the act complained of was the first or last individual manifestation of the general plan that could be shown. It cannot be denied that a repetition of utterances of false and fictitious notes tends to negative innocence in particular cases. Mr. Wigmore says the principle applicable to such evidence proceeds upon the doctrine of chances. As to remoteness of time of the utterances sought to be introduced and the similarity of the notes or bills uttered on the several occasions, the rulings exhibit views of all degrees of liberality and narrowness. (Wigmore on Evidence, sec. 310.)

Conceding that the principle upon which this evidence is introduced is the doctrine of chances or probabilities, the number of the utterances, their remoteness in time and the similarity of the instruments become matters affecting the weight rather than the admissibility of the evidence. In such cases, if the evidence has any application under the rule, whether or not it has sufficient weight to entitle it to be submitted to the jury is a question for the determination of the trial court. (*People v. Frank*, 28 Cal. 507, 518.) The sameness of the peculiar, if not unique, method of preparation of the two sets of bills, and the similarity of the manner of realizing upon them, warranted the court in permitting the jury to determine from the two transactions whether or not the defendant was operating by a system of imposition and fraud,

and to draw therefrom such inference of intent and knowledge as the facts justified.

In the consideration of the case the fact that the record discloses that defendant sought to establish an alibi as to the principal offense, and to prove that he was not in Long Beach on the 28th of October, 1905, while he admitted being in San Pedro on the third day of November, has not been overlooked. Under such circumstances there is no doubt that the admission of the evidence as to the San Pedro transaction tended to establish the identity of the defendant as the man who passed the fictitious bill in Long Beach. Conceding, but not deciding, that it was not admissible for that purpose, it was relevant to the issue of fraudulent intent, and this was sufficient to entitle the evidence to be admitted.

The rules relating to the admission of such evidence were carefully complied with: Ground was first laid implicating the defendant in the case under trial; the defendant was shown to have committed the extraneous crime; the similarity of the offenses was apparent from the evidence; and, the jury were properly instructed by the court as to the purpose of the introduction of the evidence. There was no error in the introduction in evidence of "Exhibit B," nor in permitting the prosecution to introduce the testimony given in connection therewith.

Defendant's motion for a new trial, as displayed in the transcript, also relies upon the ground that the court erred in instructing the jury. No particulars are specified in the transcript and none presented in the brief. An examination of the instructions in the record fails to disclose any error in this respect.

The amendment of section 470 of the Penal Code in 1905 did not affect section 476, and section 470 has no application here. That amendment applies only to the "signing of the name of a fictitious person" with the intent to defraud, while the crime here charged is the passing of a fictitious bank note of a bank having no existence.

The judgment and order of the trial court are affirmed.

Allen, P. J., and Shaw, J., concurred.

[Crim. No. 46. Second Appellate District.—February 18, 1907.]

THE PEOPLE, Respondent, v. M. WARD, Appellant.

CRIMINAL LAW—OBTAINING MONEY BY FALSE PRETENSES—PROOF OF ONE FALSE PRETENSE SUFFICIENT.—In a prosecution for obtaining money under false pretenses, where several pretenses enter into the transaction, proof of one of them constituting an operative cause is sufficient to support the verdict of conviction. Where the false pretenses made to a firm from whom the money was obtained were that a draft for \$5,000 had been mailed to the firm for defendant's credit and that he was employing several men whom the money was needed to pay, it is sufficient to support the verdict that the latter representation was proved, whether the former was sufficiently proved or not.

ID.—PROOF OF FALSE REPRESENTATION AS TO DRAFT—CONDUCT OF DEFENDANT.—In determining whether the false representation as to the draft was proved, the jury was authorized to consider the acts and conduct of the defendant; and the fact that the defendant never called upon the firm after obtaining their money, nor made any inquiry about the \$5,000 draft, and three months after the transaction was found seven hundred miles from the scene thereof, in the absence of explanatory circumstances, is convincing evidence that no draft had been ordered, and that none was expected.

ID.—SIMILAR FALSE STATEMENTS—CORROBORATION OF PROSECUTING WITNESS—SCHEME TO COMMIT CRIME.—Where the defendant denied all the statements of the prosecuting witness, the court properly allowed the testimony of another witness, that on the day of the procurement of the money, and inferentially before it was procured, defendant stated to the witness that he was expecting a draft of \$5,000, and also a shipment of tools for men he was employing, which he wished to store with the witness, but which were not received, as being corroborative of the testimony of the prosecuting witness, and as being material and cogent evidence of a scheme of defendant to commit the subsequent crime.

ID.—INDEPENDENT STATEMENTS INCONSISTENT WITH DEFENDANT'S CLAIM—PRELIMINARY PROOF NOT REQUIRED.—Independent statements of the defendant, which are inconsistent with the defendant's claim and not amounting to a confession, may be proved against him as an admission, without the requirement of preliminary proof.

APPEAL from a judgment of the Superior Court of Ventura County, and from an order denying a new trial. Felix W. Ewing, Judge.

The facts are stated in the opinion of the court.

Shepherd & Barnes, for Appellant.

U. S. Webb, Attorney General, and E. E. Selph, Deputy Attorney General, for Respondent.

ALLEN, P. J.—The defendant was charged in the superior court of Ventura county with obtaining money under false pretenses and convicted. He appeals from the judgment and an order denying a new trial.

The information alleged that defendant falsely, etc., represented to Collins & Sons, a firm doing business at Ventura, that there had been mailed to said firm a draft for \$5,000 to the credit of defendant, which would be received by said firm within a day or two; and further, that defendant had in his employ in said county several men and he desired an advance of \$100 with which to pay said men; that thereby Collins & Sons were induced to deliver to said defendant \$100; that all of said representations were false and were made knowingly and designedly for the purpose of defrauding said firm. The information is sufficient; nor is the same challenged by appellant.

The chief contention of defendant is, that there is no evidence that he had not ordered such draft sent, and the other representations so made are not sufficient to support the charge. That the representations were made is not controverted. It was competent for the jury in determining the truth or falsity of such representations to take into consideration the acts and conduct of the parties. That is permissible in determining the falsity of any pretense. (*People v. Wasservogle*, 77 Cal. 174, [19 Pac. 270].) The fact that defendant never called upon Collins & Sons after the transaction, nor made inquiry about the draft, involving, as it did, a large sum of money, but left the county and was found three months thereafter several hundred miles from the scene of the transaction, in the absence of any explanatory circumstances, is convincing evidence that no draft had been ordered, nor was one expected. In addition to this there was evidence warranting the jury in determining that the statement that defendant had several men in his employ in the county, for the payment of whose wages the money was demanded, was false and that such representation was an inducement for the advance. Where several false pretenses enter into the transac-

tion, proof of any one thereof constituting an operative cause is sufficient to support the verdict. It is obvious that such representation in relation to the employment of men in the vicinity was a representation as to an existing fact, and, if believed, tended to establish a credit and standing for the employer, and the effect of which would be to influence one desirous of aiding local enterprises in making such advance. The testimony in the record sufficiently proved the *corpus delicti*.

It is further insisted by defendant that the evidence of one Barnes, admitted under objection, was incompetent and an attempt to show that defendant had been guilty of another offense than the one with which he stood charged. This evidence was to the effect that on the day of the procurement of the money from Collins & Sons, though not in their presence, but about the same time and at the same town, defendant represented to Barnes that he was expecting a shipment of tools for use in development work in the Matilija and solicited from Barnes storage room therefor, and, in addition, represented that he was expecting a draft that afternoon for \$5,000; that these tools never arrived to the witness' knowledge. It will be observed that nothing in Barnes' testimony tended to show another or distinct offense, and we are not confronted with the question as to the admissibility of evidence in relation to another offense; but even in such case, "whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion." (*People v. Walters*, 98 Cal. 141, [32 Pac. 864].) In the case under consideration it was material for the jury to determine whether the representations made to Collins, as testified to by him, were actually made. Representations of similar import made to Barnes about the same time and place tended to corroborate Collins. In addition to this, the defendant by his plea of not guilty denied every material allegation in the information, among which was that he made the representations as to the expectancy of the draft and the employment of men in the Matilija. These representations and statements to Barnes were inconsistent with such denial. "Anything said by a party may be used against him as an admission, provided it exhibits the quality of inconsistency with

the facts now asserted by him in pleadings or in testimony. . . . It is their inconsistency with the party's claim that gives them logical force." (2 Wigmore on Evidence, secs. 1048-1053.) Nor is preliminary proof required to authorize the admission of independent statements of fact not amounting to a confession. (*People v. Le Roy*, 65 Cal. 614, [4 Pac. 649].) Were it even material as to the exact time of the representations made to Barnes in relation to those made to Collins, it will be noted that the transaction with Collins took place about noon and defendant's statement to Barnes was that afternoon he was expecting a draft, from which it may be inferred that the statement to Barnes was made before the procurement of the money from Collins, and might well be accepted as proof of a scheme to commit the subsequent crime, and such evidence was cogent and material. (*Blake v. Assurance Soc.*, 4 C. P. Div. 94, cited in *Carnell v. State*, 85 Md. 1, [36 Atl. 118].) The objections thereto go to its weight, rather than to its admissibility. (*People v. Martin*, 102 Cal. 569, [36 Pac. 952].)

We perceive no error in the record, either in the admission of this testimony or otherwise, and the judgment and order appealed from are affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 166. Second Appellate District.—February 19, 1907.]

R. H. HERRON COMPANY, Appellant, v. C. E. MAWBY,
Respondent.

CHECKS—PAYMENT—CONDITIONAL PAYMENT.—A check drawn *bona fide* on a bank having funds of the drawer is *prima facie* payment, if accepted as cash; but, in the absence of an agreement, the acceptance of it is merely conditional payment or satisfaction of the debt if and when paid.

ID.—PRESENTMENT—IMPLIED UNDERTAKING OF DILIGENCE—LOSS BY WANT OF DILIGENCE—ACTUAL PAYMENT.—The acceptance of such a check from the drawer implies an undertaking of due diligence in presenting it for payment; and if the drawer sustains loss by want

of such diligence the check will be held to operate as actual payment.

ID.—TIME FOR PRESENTMENT.—At common law the payee of a check, when drawn on a bank in the same place where it is given and received, has until the following day after its receipt to present it for payment as between himself and the drawer. When drawn on a bank in a different place, the payee has the same time and such additional time as will be required to transmit it to the place of payment by due course of mail.

ID.—AGENCY FOR PRESENTMENT—EFFECT OF MAILING CHECK TO DRAWEE BANK.—For the purpose of presenting and collecting the check the collecting bank must employ a suitable subagent. The mailing of a check to the drawee bank is not a proper presentment or demand for payment, in the absence of proof of usage or custom among banks to do so. The drawee cannot be deemed a suitable agent in contemplation of law to enforce in behalf of another a claim against itself, and such bank may hold it for any time without incurring the obligation of an acceptance.

ID.—CONSTRUCTION OF CIVIL CODE—LIMIT OF TIME—REASONABLE DILIGENCE IN PROPER PRESENTMENT.—Section 3213 of the Civil Code, which merely fixes a limit of ten days after which delay in presentment of a check will exonerate the drawer and indorsers thereof, unless the delay be for one of the reasons expressly provided by statute, still requires reasonable diligence in making the presentment, which must be made by a proper agent prepared to treat with the drawee bank at arm's-length.

ID.—LOSS OCCURRING AFTER DELAY OF TEN DAYS.—Where it appears that the loss occurred after a delay of ten days from the receipt of the check by plaintiff without lawful presentment thereof, the loss must fall upon the plaintiff, whatever view of the law may be taken.

APPEAL from a judgment of the Superior Court of Riverside County. J. S. Noyes, Judge.

The facts are stated in the opinion of the court.

Gill & Densmore, and Oscar A. Trippet, for Appellant.

Lawler, Allen & Van Dyke, and Collier & Carnahan, for Respondent.

TAGGART, J.—From a judgment dismissing its action on the merits and awarding defendant costs, the plaintiff appeals.

Plaintiff is a corporation doing business at the city of Los Angeles, and defendant resides near the town of Coachella, in Riverside county.

On the first day of October, 1904, defendant, being indebted to the plaintiff in the sum of \$620.28, drew his check for that amount on The Coachella Valley Bank, presumably located at Coachella, dated October 1, 1904, and payable to the order of plaintiff, deposited it in the United States mail, addressed to plaintiff at Los Angeles, and the check was regularly received by plaintiff before 3 o'clock P. M., on the fourth day of October, 1904.

On the same day plaintiff placed said check in the National Bank of California at Los Angeles for collection, and the said bank thereupon, on the same day, mailed the check directly to the Coachella Valley Bank for payment. The Coachella Valley Bank did not acknowledge receipt of the check to either plaintiff or the National Bank of California and neither of the latter parties made any inquiry of the Coachella Bank why it had not acknowledged receipt of said check or whether or not said check had been paid; and the National Bank of California did not notify either plaintiff or defendant of the failure of the Coachella Valley Bank to acknowledge receipt of said check.

At the close of business hours on Saturday, October 15, 1904, the Coachella Valley Bank closed its doors and ceased to transact business and ever since said time has been without funds with which to meet the claims of its depositors. The check in question was not paid, but was received by said National Bank of California at Los Angeles, by United States mail on the eighteenth day of October, 1904, having been mailed to it at San Bernardino, October 17, 1904, by one Paul Bodenhamer. Defendant was not notified of the nonpayment of said check until the afternoon of October 18, 1904.

The trial court finds, that at all times between the first day of October, 1904, and the close of banking hours on the fifteenth day of October, 1904, defendant had on deposit in said Coachella Valley Bank a sum of money more than sufficient in amount to pay said check, and that said bank was open for the transaction of business, and receiving deposits and cashing checks, and that the persons owning and conducting the same had sufficient property and funds subject to exe-

cution and legal process to pay said check, at all times between said dates.

It also finds that there were two daily United States mails each way between the town of Coachella and the city of Los Angeles, and that at all times between the first and eighteenth days of October, 1904, Wells, Fargo & Co., a corporation doing a general express business, was engaged in the collection of checks, etc., at Coachella, and in direct correspondence with the office of said company at Los Angeles.

The conclusions of law of the trial court are, that the plaintiff and its agent, the National Bank of California, were negligent in sending the said check *directly* to said Coachella Valley Bank for payment; were negligent in not sooner knowing that said check had not been paid, and negligent in not notifying defendant of the failure to receive any response from the said check.

Whilst a check drawn *bona fide* on a banker having funds of the drawer is *prima facie* payment, if accepted as cash, still, in the absence of any express agreement, the acceptance of a check of either the debtor or a third party is in fact merely conditional payment—that is, satisfaction of the debt *if* and *when* paid; but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment. (*Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20-22, [20 Pac. 28].)

At common law the payee of the check has until the following day after its receipt to present it for payment as between himself and the drawer, when drawn on a bank in the same town or city where the check is given and received. (*Ritchie v. Bradshaw*, 5 Cal. 228; *Himmelmann v. Hotaling*, 40 Cal. 115, [6 Am. Rep. 600].) When drawn on a bank in a different place, the payee has the same time, and in addition thereto, such time as will be required to transmit it to the place of payment by due course of mail. (*Manitoba v. Weiss*, 18 S. Dak. 459, [112 Am. St. Rep. 799, 101 N. W. 37].)

That the sending of a check by United States mail directly to the drawee bank does not constitute a proper presentment for payment, in the absence of proof of usage or custom among banks to do so, is established by the weight of authority. This is recognized by most of the American cases, and in those

in which the facts do not fall within the general rule the weight of authority is admitted and the case distinguished. This is true of most of the cases cited by appellant. For instance: The instrument was payable *at* the bank by its maker and not *by* the bank (*Indig v. City Bank*, 80 N. Y. 106); a usage was directly proven and relied upon, much stress being laid thereon in the opinion (*Kershaw v. Ladd*, 34 Or. 375, [56 Pac. 402, 44 L. R. A. 236]); positive instructions were given by the party for whom the collection was made to make presentment in this way (*First National Bank v. Citizens' Sav. Bank*, 125 Mich. 336, [82 N. W. 66, 48 L. R. A. 583]); or the facts showed that if sent through a third person it could not have reached the drawee bank before it failed (*First Nat. Bank v. City Bank*, 12 Tex. Civ. App. 318, [34 S. W. 458], etc.).

The law and its reasons are declared in the following language from Daniel on Negotiable Instruments (volume 1, section 328-a): "For the purposes of collection the collecting bank must employ a suitable subagent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittance be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent in contemplation of law, to enforce in behalf of another a claim against itself." (*Drovers' Nat. Bk. v. Anglo-American etc.*, 117 Ill. 100, [57 Am. Rep. 855, 7 N. E. 601]; *Anderson v. Rodgers*, 53 Kan. 542, [36 Pac. 1067]; *Minneapolis etc. v. Metropolitan Bank*, 76 Minn. 136, [77 Am. St. Rep. 609, 78 N. W. 980].)

The fact that a check is sent to the drawee bank through the mails does not amount to a demand for payment and the bank may hold it any length of time without incurring the liability of an acceptance. (Morse on Banks and Banking, 289.)

We do not agree with appellant that, because section 3213 of the Civil Code by the provisions of section 3255 becomes applicable to checks required to be transmitted to another place for presentment, therefore the common-law doctrine of presentation of such checks with reasonable diligence after the time taken in reaching the place of payment is no longer to be considered in this state. On the contrary, this section merely fixes a limit after which delay in presentment will exonerate the drawer and indorsers of such a check, unless the delay in presentment be for one of the reasons expressly provided by

statute. Under the provisions of section 3213 of the Civil Code, reasonable diligence in making presentment must still be exercised by the holder of such a check, and this must be within the statutory limit of ten days, or he loses his right to hold the drawer or indorsers of the check. The presentation must be by some one capable of acting in the interest of the drawer, of whom the collecting bank is the agent, for the purpose of collection. The person making presentment should be prepared to treat with the drawee bank at arm's-length.

"Had presentment been made by another agent of the plaintiff and payment refused, steps might have been taken immediately to protect the drawer's rights; but the check (having been sent to it by mail) being in the hands of the drawee, of course no effort would be made by it to prosecute itself," says the Kansas supreme court in *Anderson v. Rodgers*, 53 Kan. 542, [36 Pac. 1067].

In that case a check was received by the drawee bank, by mail, on December 12th after business hours; the bank was open for the transaction of business all day December 13th. but failed to open December 14th. The court held the collecting bank negligent in making presentment of the check. That under the statute there was still time to make a proper presentment, after the abortive one, will not avail the collecting bank or excuse it from responsibility for its negligent act, if the fund be lost to the drawer. (*First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318, [34 S. W. 458].)

The findings in the case at bar show that the National Bank of California, without instructions to that effect, or without evidence of custom or usage to support its act, and notwithstanding there was another and independent public agent for the collection of drafts, checks, etc., in the town of Coachella, sent the defendant's check to the Coachella Valley Bank to collect from itself. It failed to make good. There was no capable or proper agent selected to act in the interest of the drawer between October 5th and the close of banking hours of October 15th, and the fund in the Coachella Valley Bank was lost.

If it were conceded that, under section 3213, the National Bank, notwithstanding its negligent manner of making presentment, would be permitted to sit idly by, at defendant's risk, for ten days after the check reached Coachella, still it was the negligence of the plaintiff and the agent it selected

that caused the loss of the fund to the drawer. The check was in the hands of the subagent selected by the National Bank (the Coachella Valley Bank) on the morning of October 5th, and, it was not presented "within ten days" after it reached the place of payment, as it had not been presented up to the close of banking hours on October 15th. The conclusion that plaintiff and its agent were negligent is clearly supported by the findings, whichever view of the law is taken. Judgment affirmed.

Allen, P. J., and Shaw, J., concurred.

[Crim. No. 73. First Appellate District.—February 20, 1907.]

THE PEOPLE, Respondent, v. DAVID MITCHELL, Appellant.

CRIMINAL LAW—RAPE—CROSS-EXAMINATION OF PROSECUTRIX—COMPLAINT UNDER THREAT OF IMPRISONMENT.—Upon a prosecution for rape by sexual intercourse with a girl under sixteen years of age, it was prejudicial error to refuse to allow the defendant to show upon cross-examination of the prosecutrix, as affecting her credibility, that at the time of making the complaint she was under arrest for vagrancy, and had been threatened with imprisonment if she did not swear to the complaint, and that acting under fear thereof she was induced to swear thereto.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

H. S. Aldrich, J. E. McElrath, and W. J. Donovan, for Appellant.

U. S. Webb, Attorney General, C. N. Post, Assistant Attorney General, and J. Charles Jones, for Respondent.

KERRIGAN, J.—The defendant was convicted of rape, for having sexual intercourse with a female child under the age

of sixteen years not his wife, and has appealed from the final judgment of conviction, from the order denying a new trial, and from the order denying the motion in arrest of judgment.

For the purpose of showing the character of the testimony, and that because of its character a liberal cross-examination of the prosecutrix should have been permitted, a short recital of the evidence for the people is necessary. The prosecutrix testified that she with her girl friend, Bernice B. (the name of this witness being immaterial to the discussion) went to the offices of the defendant on the seventeenth day of November, 1905, at about 5 o'clock in the afternoon. There the prosecutrix had sexual intercourse with defendant, and pursuant to her expectations received the sum of \$2.50, with which (according to her testimony) she intended to buy a costume to wear at a skating rink carnival. The arrangement for the intercourse had been made by her friend Bernice, who accompanied her to defendant's office, and waited in the reception-room while defendant and prosecutrix retired to a bedroom adjoining. The latter testified: "From the bedroom the defendant and I, after putting on our clothes, went into the office, where he gave me \$2.50. He also gave Bernice \$1 in the reception-room. When he gave me the \$2.50 I think he told me not to speak of being in his office because it might get him into trouble." She further testified that at another and subsequent time she had sexual intercourse with the defendant.

The only other evidence in chief for the people was the testimony of Bernice, who really acted as procuress. She had recently introduced the parties, and had told the defendant, among other things, that she thought E. (the prosecutrix) "would do the business." She, too, testified that she accompanied E. to the offices of defendant, and that defendant paid her \$1.

There are several instances in which it is claimed that the trial court erred in its rulings on the cross-examination by the defendant of the prosecutrix and the witness Bernice. While it is true that the extent of a cross-examination is largely within the discretion of the trial court, yet we think the trial court in this case unduly and needlessly restricted the cross-examination in the following instances:

"Question by Defendant (to Prosecutrix): Was there any inducement or threat held out or made to you to get you to sign the complaint against Mitchell?

"To which question the district attorney objected on the ground that it was irrelevant, immaterial, incompetent and not proper cross-examination.

"The Court: I don't see the materiality of it. Will you point out in what way it is material?

"Mr. Aldrich: Only as going to the credibility of the witness in this. This, of course, is simply a preliminary question. While I want to be perfectly fair, I do not think I ought to state my reasons before the jury, unless your Honor is going to say that this, being a preliminary question, that we have a right to ask the question.

"The Court: I do not conceive that you have a right to pursue this kind of examination at this time.

"Mr. Aldrich: Then our object in asking that question, our reason for it is this: We expect to show by this witness that at the time of the making of this complaint, this witness was under arrest by the police of this city on a charge of vagrancy. That at this time a man by the name of B., whose daughter is the girl Bernice, was present at the courthouse, in the office of the police, and at that time threatened that in case this girl did not make complaint as against Mitchell that he would cause her to be sent to an institution, say Whittier, upon a charge of vagrancy. That acting upon that and in fear, believing that he would do as he said he would do, this young woman was induced to swear to this complaint as against Mitchell.

"The Court: If every fact that you have stated be so, you should well know that it is not competent evidence in this case."

The same question substantially was again repeated during the trial, to which the same objection was made, followed by the same ruling.

The question was admissible under section 1847, Code of Civil Procedure, to show motive. "Section 1847. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies . . . by evidence affecting his motives."

In the case of *People v. Howard*, 143 Cal. 316, [76 Pac. 1116], Chief Justice Beatty, in a concurring opinion in a rape

case, said: "There was evidence to the effect that the prosecutrix was induced by threats of imprisonment to make the accusation, and if the jury believe this evidence they should have taken it into consideration in determining her credibility."

In the case of *People v. Christy*, 65 Hun, 352, [20 N. Y. Supp. 278], a witness was asked: "Did you understand by making the statement which you did make you would relieve yourself from prosecution?" This was objected to and excluded, and the defendant excepted. It was held that this should have been admitted, the court saying: "It related to the position of the witness with reference to the complainant and the prosecuting officer, and was competent and material as affecting his credibility" (citing Wharton's Criminal Evidence, sec. 477).

In the case of *People v. Benson*, 6 Cal. 223, [65 Am. Dec. 506], while the court was not discussing the point under consideration here, yet what it there said had an important bearing on this case generally, and especially in view of the fact that the prosecutrix herein was, as is generally the case, the sole witness to the act itself. We quote from that case: "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless, and courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding."

In a late and similar case in this state, it is said: "It will be sufficient to say in a general way that in a case of this character the very widest latitude, compatible with our somewhat technical and restricted rules of evidence, should be allowed the defendant in his cross-examination of the witnesses of the people. More especially is this true with reference to the prosecuting witness. In this class of prosecutions the defendant, owing to natural instincts and laudible sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence, that he should be given the full measure of every legal right in an endeavor to maintain his innocence." (*People v. Baldwin*, 117 Cal. 249, [49 Pac. 186].)

The defendant would clearly have had the right on cross-examination of the prosecutrix to show, if it were true, that for charging the defendant with rape and proceeding against him on that charge she had received a consideration in money. The motive which might prompt her to make a colored or false statement in that case would be money, while in the case under discussion it would be to escape punishment and enjoy her liberty. In each case the evidence would be admissible as affecting her credibility. Rape is a detestable crime, for the commission of which one could hardly be punished too severely, but from some of the decisions above referred to and others that might be cited the view of the courts seems to be that, as it is a crime easily charged and hard to defend against, even though the defendant be innocent; and as it is one which, out of consideration for the protection of the family and the infant, and for other most commendable reasons is likely to unduly excite the sympathies of the jury for the prosecution, courts should be very liberal in the extent to which witnesses for the people—and especially the prosecutrix—may be cross-examined. If the prosecutrix was under arrest for vagrancy, and, while in custody, charged the defendant with rape to escape being sent to a reform school, it was eminently a proper matter for the consideration of the jury in determining her credibility; and in sustaining the objection to that question the court contravened the defendant's right and committed prejudicial error, for which the judgment must be reversed.

The prosecutrix was permitted, over the objection and exception of the defendant, to testify as to her age. Authority for the ruling of the court is found in *People v. Ratz*, 115 Cal. 132, [46 Pac. 915]. Defendant claims this was error, and he cites the later case of *People v. Baldwin*, 117 Cal. 249, [49 Pac. 186], which he claims in effect overrules the former case. The contention of the defendant is that the testimony of the prosecutrix as to her age is hearsay, and inadmissible under sections 1845, 1852 and 1870, subdivision 4, Code of Civil Procedure, unless the proper foundation shall be laid by proof that the members of the family and blood relatives, from whom she received the information, are dead or out of the jurisdiction of the court. As the case will have to be retried for the reason already assigned, it is unnecessary to pass

on this point. Doubtless the district attorney, having had his attention called to the matter, in order to avoid possible error on a new trial, will pursue what would seem to be the safer course—the one laid down in the later case.

Since the appeal is, in part, from the final judgment, there is no merit in what seems to be contention of the respondent, that the appellant having taken no exception to the order denying the motion for a new trial, is deemed to have waived his right of appeal. (*People v. Thompson*, 115 Cal. 161, [46 Pac. 912].)

For the reasons stated, the judgment is reversed and a new trial ordered.

Hall, J., and Cooper, P. J., concurred.

[Civ. No. 288. First Appellate District.—February 21, 1897.]

L. F. GIFFEN, Respondent, v. SELMA FRUIT COMPANY, Appellant.

BREACH OF CONTRACT TO SEED AND PACK RAISINS—NEGLIGENCE—DAMAGES—QUESTION OF TITLE.—In an action to recover damages for breach of contract by a fruit company to seed and pack a carload of raisins for a firm in a first-class manner, where it appears that they were so negligently seeded and packed that they were spoiled and became worthless, the fruit company became liable to the firm for the damages caused by the violation of the contract, if it does not appear, as claimed by the fruit company, that the firm had parted with the title to the raisins by a sale thereof before suit.

ID.—SALE OF RAISINS BY SAMPLE—WARRANTY OF QUALITY—REJECTION BY PURCHASER—TITLE NOT PASSED.—Where the carload of raisins in question was sold by sample by the firm before suit, a warranty to the purchaser was implied that the raisins were up to the sample, and where they were rejected by the purchaser upon inspection as not being up to the sample, no title passed thereto from the firm.

ID.—DELIVERY OF BILL OF LADING WITH DRAFT—INTENTION NOT TO PASS TITLE.—Where the raisins sold by sample were billed to the order of the firm, subject to inspection and acceptance by the purchaser, and the bill of lading and an accompanying draft were received by the purchaser and the draft paid, before the raisins arrived, which, upon arrival and inspection, were rejected, after which the

draft was repaid by the firm, it is clear that it was intended that the bill of lading should not have the effect to pass the title.

ID.—EVIDENCE—COURSE OF BUSINESS.—Evidence was admissible to show the course of business of the proposed purchaser with the firm to pay all drafts accompanying bills of lading, without reference to the transfer of the goods shipped by the bill of lading, that the drafts were paid and charged to the account of the seller, and the goods, when received and accepted, were credited to the seller.

ID.—CROSS-EXAMINATION—CORRESPONDENCE—BEST EVIDENCE—MOTION TO STRIKE OUT—DISCRETION.—Where, on cross-examination, it appeared that various letters passed between the parties, it was not an abuse of discretion for the court to refuse to strike out the evidence with regard to the course of business, on the ground that the letters were the best evidence, where no objection was made when the evidence was offered, and it does not clearly appear that all the course of business was by letters, and where defendant made no attempt to have the letters produced.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a motion for new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Strother & Strother, and Harris & Perkins, for Appellant.

M. B. Harris, E. M. Harris, and Frank Kauke, for Respondent.

COOPER, P. J.—This action was brought to recover damages for breach of contract, and was tried before a jury. A verdict was returned for plaintiff, upon which judgment was duly entered. This appeal is from the judgment and order denying defendant's motion for a new trial.

The facts are in substance as follows: In September, 1904, the defendant entered into a contract in writing with L. F. Giffen and Co. (plaintiff's assignor) by the terms of which it agreed to seed and pack in a first-class manner the raisins of Giffen & Co. for the season of 1904-5 at the rate of \$1.35 per hundred pounds.

In December, 1904, the defendant, under the contract, seeded and packed the carload of raisins, out of which this controversy arose, for Giffen & Co., and received compensation therefor according to the terms of the contract. It is alleged

that instead of seeding and packing the raisins in accordance with the contract, the defendant negligently seeded and packed them so that they spoiled and became absolutely worthless. The verdict of the jury finds by implication that the allegation as to defendant's negligence is true. The statement on motion for a new trial shows that the plaintiff introduced evidence tending to show that the raisins were not in good condition, and that their condition "was due to the fault and negligence of the defendant in seeding, processing and packing said raisins." Appellant's counsel, in their opening brief, very frankly and properly admit that "the evidence as to such wrongful acts of defendant was conflicting, and the jury found for the plaintiff."

It seems, therefore, evident that the defendant violated its contract, and thus became liable for the damages it caused thereby.

It is contended, however, by the defendant that Giffen & Co., prior to the commencement of this action, had sold the raisins to McCord-Brady Co. of Omaha, and hence they argue that the right of action was in McCord-Brady Co. and not in the plaintiff. The decision of the case upon its merits is thus dependent upon the question as to whether or not Giffen & Co. had parted with the title to the raisins. The evidence shows that prior to the commencement of the action Giffen & Co. had agreed to sell to McCord-Brady Co. at Omaha a given quantity of raisins in accordance with a sample which had been sent. The carload of raisins involved in this suit was shipped to fill this order. The raisins were billed to the order of Giffen & Co. at Omaha subject to inspection. When the shipment was made Giffen & Co. drew on McCord-Brady Co. for the agreed price of the raisins, the draft being attached to the bill of lading, and forwarded to the National Bank of Omaha for collection. The bill of lading bore across the face of it the direction to "allow inspection." An invoice and bill of the raisins were sent to the McCord-Brady Co., and the draft was paid by them upon presentation, but at the time it was paid the company had not inspected nor received the raisins, because they had not arrived at their destination. Upon the arrival of the raisins they were rejected upon inspection, and Giffen & Co. were notified of such rejection, and upon being so notified they stored the raisins in a warehouse

in Omaha, and were unable to dispose of them. In the course of dealing between Giffen & Co. and the McCord-Brady Co., the drafts drawn on the company at Omaha were paid, charged to the account of Giffen & Co., and the goods, when received, credited to Giffen & Co. The draft in this case was charged to the account of Giffen & Co., and has since been paid in full by them.

We are of opinion that the above facts do not constitute a sale of the raisins to the McCord-Brady Co. A sale is a contract by which one transfers to another an interest in property. In order to constitute a sale the contract must give and pass rights of property. The property must be identified. The evidence shows that the raisins were bought by sample, and that they were rejected, because not up to sample. Upon proof that the sale was made by sample the law implies a warranty that the quality of the property sold is up to the sample exhibited (Civ. Code, sec. 1766), and the title will not pass until there has been an acceptance. (Mechem on Sales, secs. 522, 746, 1212; *Pope v. Allis*, 115 U. S. 372, [6 Sup. Ct. 69]; *Taylor v. Saxe*, 134 N. Y. 67, [31 N. E. 258]; *Gardiner v. McDonogh*, 147 Cal. 313, [81 Pac. 964].)

It is claimed that the delivery of the bill of lading with the draft to McCord-Brady Co. had the effect to transfer the title of the carload of raisins to McCord-Brady Co. A bill of lading does not in all cases transfer the title of the property described thereon to the party to whom it is delivered. It depends upon the circumstances of the particular case and the intention of the parties. In this case the intention was that the bill of lading should be delivered to McCord-Brady Co. with the draft, and when the draft was paid and the raisins inspected and accepted as being up to the sample the title should vest in McCord-Brady Co. The bill of lading was delivered, the draft paid, but the goods were not what McCord-Brady Co. had purchased, and they never accepted them, nor did they take possession of them. It was not intended that the title should pass by the delivery of the bill of lading. A bill of lading does not have the effect of passing the title, where the evidence clearly shows a contrary intention (*Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 364, [18 Am. Rep. 299]; *Hülmer v. Hills*, 138 Cal. 135, [70 Pac. 1080]; *Dodge v. Meyer*, 61 Cal. 405).

One Broadwell, the bookkeeper of Giffen & Co., was called as a witness for plaintiff, and after giving evidence of various matters in which no objection was made, testified that Giffen & Co. had made various shipments of raisins to McCord-Brady Co., covering a period of more than a year. He was then asked the question: "Q. Now, then, state the course of business that has been followed all the time, if any, as to the drawing on them in these matters and the payment of the draft." To this question the defendant objected upon the ground that it was incompetent, irrelevant and immaterial, "and the only thing that would be competent, material or relevant would be what was actually done in this case." The objection to the question was overruled. The witness then testified that sometimes Giffen & Co. would bill a car for the actual amount, and draw for it as in the case at bar, and at other times they would draw on McCord-Brady Co., and hold the goods in their own warehouse. That McCord-Brady Co. always paid the drafts so drawn as they did in this case.

The evidence was properly admitted. It tended to show the intention of the parties as to the transfer of the title to the raisins. It tended to show that by the course of dealing the drafts of Giffen & Co. were paid without reference to the transfer of the goods shipped by a bill of lading. It was shown by the cross-examination of the witness that various letters had passed between Giffen & Co. and McCord-Brady Co., and that the negotiations were by letters. The witness also testified that the understanding arrived at was from the letters and "the understanding between us and Cartan & Jeffrey and through them with McCord-Brady." Defendant's counsel then moved the court to strike out the testimony of the witness as to the course of business on the ground that it was not the best evidence. The court denied the motion, and we deem it sufficient to say that in so doing it did not abuse its discretion. The objection on the ground that the course of business could not be shown by oral testimony because reduced to writing was not made when the evidence was offered. Nor does it clearly appear by cross-examination that all the course of business was contained in the letters. Defendant made no attempt to get the letters or to have the plaintiff produce them in court.

It was not error to give plaintiff's instruction No. 6, as it is in accordance with what we have said as to the passing of title by the bill of lading.

The judgment and order are affirmed.

Kerrigan, J., and Hall, J., concurred.

[Civ. No. 238. Third Appellate District.—February 21, 1907.]

EDWARD DOYLE, Respondent, v. JAMES C. ESCHEN et al., Appellants.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS OF FACT AND LAW.

Where the facts are such that reasonable men may fairly differ as to whether there was negligence or contributory negligence or not, in a case of personal injury, the determination of the matter is a question of fact for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is one of law for the court.

Id.—MIXED QUESTION OF LAW AND FACT.—Usually the consideration of negligence, including contributory negligence, involves a mixed question of law and fact, in which it devolves upon the court to say, as matter of law, what is or amounts to negligence, and upon the jury to say, as matter of fact, whether or not in the particular case the facts proved show negligence.

Id.—MOTION FOR NONSUIT—QUESTION OF CONTRIBUTORY NEGLIGENCE—FACTS TAKEN AS PROVED—INFERENCES AGAINST DEFENDANT.—Upon a motion for a nonsuit on the ground that contributory negligence is shown by the plaintiff's evidence, every fact that plaintiff's evidence proves or tends to prove must be taken by the court as proved, and must be taken in the strongest light against the defendant, and interpreted most strongly against him.

Id.—MOTION PROPERLY DENIED—QUESTION FOR JURY.—*Held*, that plaintiff's evidence, admitting that his testimony was somewhat inconsistent and partly absurd, does not show as matter of law that he was guilty of contributory negligence, and that it was proper to deny the motion, and to submit the question of contributory negligence to the jury.

Id.—COSTS—LEGAL PERCENTAGE IN SAN FRANCISCO—STATUTE NOT REPEALED.—The act of February 9, 1866 (Stats. 1865-66), regulating the recovery of a percentage in litigated cases in the city and county of San Francisco to be included in the judgment against the adverse party, was not repealed by the fee law of 1895, and the percentage allowed by that act is still recoverable.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. F. J. Murasky, Judge.

The facts are stated in the opinion of the court.

Van Ness & Redman, and L. A. Redman, for Appellants.

Sullivan & Sullivan, and Theo. J. Roche, for Respondent.

BURNETT, J.—This is an action for damages. It was occasioned by respondent falling into the hold of a vessel, through a ballast hatch in the lower deck. This hatchway, it is claimed, without the knowledge of respondent and without notice to him and when he had reason to believe and did believe it was closed, was left open and unprotected and without any lights about it, through the negligence of appellants, who were stevedores engaged in ballasting said vessel. Defendants in their answer, either positively or on information and belief, denied the material allegations of the complaint and alleged that "immediately after said hatch was uncovered and before said accident the employees of these defendants put a guard and fender around it and also placed lights near by it, which lights were burning at the time plaintiff fell into said hatch."

The case was tried before a jury. A verdict in favor of plaintiff for \$7,500 was rendered. Defendant appealed from the judgment and the order denying their motion for a new trial and also from an order refusing to strike from plaintiff's memorandum of costs the item of \$100, "alleged legal percentage on the judgment in favor of plaintiff herein."

At the close of plaintiff's evidence, defendants moved for a nonsuit, which was denied.

Among the reasons urged for reversal, appellants seem most confident of their contention that by reason of contributory negligence respondent was not entitled to relief and that their motion for a nonsuit should have been granted by the learned judge of the trial court. As so often affirmed by the higher courts, it is conceded that "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where

the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." (*Texas C. Ry. v. Gentry*, 163 U. S. 353, [16 Sup. Ct. 1104].) And, furthermore, that usually the consideration of negligence, including "contributory negligence," involves "a mixed question of law and fact, in which it devolves upon the court, to say, as a matter of law, what is or amounts to negligence, and upon the jury to say as matter of fact whether or not in the particular case the facts in proof warrant the imputation of negligence. The court furnishes the standard; the jury adjusts the facts and pronounces them as up to or falling short of the requirements of the standard. When, however, the facts are clearly settled, and the course which common prudence dictates can be readily discerned, the court should decide the case as matter of law." (*Van Praag v. Gale*, 107 Cal. 438, [40 Pac. 555]; *Shearman and Redfield on Negligence*, sec. 26; *Davis v. Pacific Power Co.*, 107 Cal. 575, [48 Am. St. Rep. 156, 40 Pac. 950]; *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, [62 Pac. 308, 64 Pac. 993].)

It is also not controverted that the motion for a nonsuit is substantially a demurrer to the plaintiff's evidence, and this being so, and the court having no right to pass upon the weight of evidence, every fact that plaintiff's evidence proves or tends to prove must be taken by the court to be proved. It must be taken in the strongest light as against the defendant (*Purnell v. Raleigh & G. R. Co.*, 122 N. C. 832, [29 S. E. 953]), and "at the hearing of such motion the evidence should be interpreted most strongly against the defendant." (*Wright v. Roseberry*, 81 Cal. 87, [22 Pac. 336]; *Warner v. Darrow*, 21 Cal. 309, [27 Pac. 737]; *Hanley v. Bridge Co.*, 127 Cal. 236, [59 Pac. 577].)

It is only in comparatively rare cases when the court is justified in saying as a matter of law that a given state of facts constitutes contributory negligence and precludes the plaintiff from recovery. It is easy to formulate a *rule of contributory negligence*, but it is much more difficult by that rule to measure the facts and determine incontestably the only conclusion warranted by the standard of ordinary prudence, caution and discretion. In the accidents occasioned by persons passing over the tracks of steam railroads, in order to obviate the imputation of contributory negligence, the con-

sensus of the opinion of men of ordinary care and prudence has become crystalized into the demand, recognized by all the courts, that the injured party must stop and look and listen before placing himself in a position of such manifest peril. But in the multifarious positions of hazard involved in the varied pursuits and environments of modern civilization it is apparent that seldom can the law prescribe with precision what specific acts of omission or commission shall prevent the recovery of damages for injuries received. In most cases, under proper instructions, the determination of the question should be left to the decision of a jury.

In the present instance, considering the evidence most favorably to respondent is it true that only one conclusion could be drawn by men of average caution and intelligence? And is that irresistible conclusion to the effect that respondent was guilty of such contributory negligence as to preclude recovery, notwithstanding the negligence of defendants? It is so insisted by appellants. The plaintiff testified that for two weeks he had been engaged at work as foreman ship carpenter in constructing and placing waterways in said vessel, as alleged in the complaint; that when he began his work the hatchways were all covered with spiked plank; "that there were three decks on the vessel and four ballast hatches on each of the two lower decks and none on the upper deck, and these hatches were only used for ballast; that during his work there the men and himself were accustomed daily to traverse the lower deck, walking over these hatches, which were nailed down, and carrying timbers on their shoulders; that when he left at 12 o'clock, March 18th, the trimming or ballast hatches were all covered up; that they worked upon the ship with candle-light and it was too dark to do without it; that when he came back from lunch about 1 o'clock he went down the forward hatch and then walked aft on the lower deck; that he could not see much there, although there were a few lights scattered around with the men working; he walked on the starboard side in the same direction in which he had been accustomed to walk for two weeks and he fell into the ballast hole, and there was neither light, fender, guard nor rails there, and he could not see the hole in the darkness prevailing at the time; there was no person there to warn him, he had not been warned, and he did not know the ballast hatchway had been opened; and that was the first time it was open in two weeks;

the hatch is only about three feet square; there was very little ballast in the hold at the time, but some came down upon him after he fell in. He knew the usual way of guarding hatchways; some have ropes and stanchions; some have boxes, put down into these holes, so that the ballast can go through them when they are working, and when they are idle they have covers; they are supposed to be covered all the time; the ballast was thrown through the side port into the between decks and wheeled aft to the trimming hatch in the middle deck and dumped into that and so went through the corresponding hatch of the lower deck into the hold of the vessel; there was no cargo in the vessel and the work kept the coal dust moving all the time, especially on the lower deck."

In the cross-examination the additional circumstances brought out which may be of some moment are as follows: The ship was partially ballasted before it was brought to Spear-street wharf where the accident occurred; respondent did not know the ballasting was not completed at the time of the accident; that earlier in the day he had seen on the ship Mr. McDonald, the foreman of defendants, but he had no conversation with him, and he could not say what Mr. McDonald was doing there; that he did not know of any other men on board except those in his employ; he supposed McDonald was there to do ballasting, but he did not ask him and he did not take the trouble to go and see if the trimming hatch was open or shut, because he had no business to do so and because he knew the hatch was shut when he went to lunch; it is usual to put a light at the hatch when it is opened up; if he had seen one it would have been notice to him to look out, that the hatch might be open; that when he came back from lunch he saw them putting ballast from the outside onto the between decks; it is piled up there and then wheeled and thrown down the trimming hatch; he did not know how much they had put in at that time; at the time he went down on to the lower deck he knew they were ballasting the ship, but took no pains to ascertain whether they were putting it through the center or the forward or the trimming hatch, and he did not hear any ballast dropping into the hold of the vessel; they would move the ballast with wheelbarrows from the middle deck to the place on the lower deck where they wished to deposit it in the hold; he did not see any wheelbarrows nor anyone near the ballast holes; he did not have

any candle with him; during the two weeks before the accident, the only holes on the lower deck were the main hatch; the bulk of the ballast is put in through the main hatch, only a small portion through the trimming hatch; in walking about onto the lower deck he knew they were ballasting the ship, front of you, but where this trimming hatch was you could not see more than two feet; there were lights on the lower deck on the starboard side of the vessel put there by his men but not near the trimming hatch.

In my judgment, the one circumstance lending some support to appellants' contention and adding some plausibility to their argument is the admission of respondent that when he returned from lunch he noticed the men engaged in the work of putting ballast into the ship. But the point at which they were loading was on the deck above and forty or fifty feet away from the trimming hatch into which he fell. Besides, construing the testimony most favorably to respondent, it must be held that he had no knowledge or notice that they were using at that time any of the trimming hatches, or that the hatch in question had been opened; and it must be conceded that neither guard, nor fender, nor light was placed about or near the opening to warn him of danger. Under the circumstances, keeping in view the fact that he had traversed this deck daily for two weeks, that his work called him there, that when he left for lunch the hatch was closed as it had been all the time for two weeks while he was at work, that he was without warning that it had been changed, and recalling his observation that "when the trimming hatch is opened it is customary to place a fender and lights about it to prevent accidents," can it be said that the law inexorably demands the conclusion that an ordinarily prudent and cautious man would not have followed the course pursued by respondent in this particular instance? It involves a question, in my opinion, open to candid disputation. Concerning it a difference of opinion among intelligent men is justified and to be expected. It was proper to submit it to the jury.

While each case, owing to its peculiar facts, is somewhat of a "law unto itself," the higher courts with jealous care have guarded from unwarranted invasion the province of the jury to pass upon the question of contributory negligence where it is open to reasonable controversy. In *Mosheval v. District of Columbia*, 191 U. S. 247, [24 Sup. Ct. 57], the

facts were these: "A water box was in the sidewalk at the bottom of three steps leading from plaintiff's house and there was no other place of egress from the house to the street. The box was so situated about midway of the steps that in order to go from the lowest step to the sidewalk it was necessary to go either to the right or the left, which it would have been safe to do, or to take a step longer than usual in order to step over the box and clear it. It was about four inches square, projecting irregularly above the level of the street, and was without covering of any kind. . . . It was in the same dangerous condition at the time of the beginning of plaintiff's occupancy of the house, about nine months before the accident, and so remained without change, and it was visible from plaintiff's house. The plaintiff stumbled over it once before and she usually went on one side or the other and not over the box, as she knew an unusually long stride was necessary. . . . She testified that from the time she left her door she had the box in view a part of the time, and had it in mind all the time and remembered its dangerous character, but on this occasion she attempted to step over it, and did not take a sufficiently long step, and put her foot into the hole and was thrown, with the result that she suffered serious injury." The United States supreme court said that the question of contributory negligence *was one for the jury and not for the court.*

Van Praag v. Gale, 107 Cal. 438, [40 Pac. 555], is another persuasive case. In the opinion the following facts are detailed, as shown by plaintiff's evidence: "For ten years prior to March 1, 1893, the plaintiff had kept a cigar store on the west side of Polk street, between Sutter and Bush streets. Defendant for eight years had owned a building consisting of two stores north of and adjoining plaintiff's cigar store. The store of defendant next to plaintiff was a candy store, and in front of it and close to the building defendant had trapdoors placed in the sidewalk four feet wide by four feet four and one-half inches in length, which opened on hinges from the center, and when opened were turned back flat upon the sidewalk. A stairway led from the opening to the basement which was used by the tenants of defendant's building. The ice-man usually came in the morning at 7 o'clock, the ash-man about nine A. M. and the gas-man at intervals, and these doors were opened to give them access to the basement. The

sidewalk was fifteen feet wide, of which eleven feet were clear of the trapdoor. Plaintiff was entirely familiar with the opening *and had often been up and down the stairs*, had seen it daily for years and had spoken to defendant about it being dangerous. The opening had no railing nor protection around it. On the morning of March 1, 1893, about 9 o'clock, plaintiff being on the sidewalk in front of his store, was called by Mr. Weinshenk, who kept a jewelry store next north of the candy store, and went to the jewelry store either over or past the trapdoors, which were closed, talked with the jeweler a few minutes, during which interval the ash-man came and one of the trapdoors was opened to admit him to the basement, and the plaintiff while returning south toward his store, thinking of what the jeweler had said to him and perhaps looking at a paper with some figures upon it, fell into the opening and was seriously injured. Plaintiff had seen the ash-man drive up, but had not seen the trapdoor opened." Our supreme court held it was a proper case to submit to the jury.

If the law was properly declared in those two cases, then it cannot be held in the case at bar that the only reasonable conclusion that can be drawn from the evidence is that respondent was guilty of contributory negligence. It is claimed by appellants that the Van Praag case is an extreme one, but it has been quoted with approval by the supreme court in subsequent cases and it is in line with many other decisions of different courts, among which may be cited the following: *Muller v. Hale*, 138 Cal. 163, [71 Pac. 81]; *Sellers v. Market St. Ry. Co.*, 139 Cal. 268, [72 Pac. 1006]; *Woods v. City of Boston*, 121 Mass. 337; *McGuire v. Spencer*, 91 N. Y. 305, [43 Am. Rep. 668]; *Lyman v. Co. of Hampshire*, 140 Mass. 311, [3 N. E. 211]; *Engle v. Smith*, 82 Mich. 1, [21 Am. St. Rep. 549, 46 N. W. 21].

It may be admitted that plaintiff's testimony was somewhat inconsistent, and portions of it seem absurd, but that was a consideration to be submitted to the jury and it does not present a question of law to be determined by this court.

2. Complaint is made of the court's action in overruling the objection of appellants to the following question: "Q. State whether or not any candle-light, even around the trimming hatch, around this hole, would enable you to see the hole itself, if there was no light at all in the hold of the vessel. A. No. Q. Why? A. The hold was black, and the deck

was black, and there was coal dust moving around all the time. It was impossible to see the hole, unless there was a light below, or a hanging light, hanging lantern about there. Candles are no good." In my opinion the objection should have been sustained, as the question called for a conclusion, but it is apparent that the error was without prejudice.

The argument is made by appellants that the testimony in effect told the jury that it was important to know whether candles placed as defendants' witnesses say they were placed would enable one approaching the hatch to see the opening itself, whereas the real purpose and the only one required was to give warning that the hatch cover was off. But the answer to that is this: Respondent without objection had already testified substantially to the same effect when he said in cross-examination that "candles were no good," and that "they would not enable you to see on account of the coal dust." But granting to the testimony the full effect claimed by appellants, it was completely nullified and the question rendered harmless by this instruction of the court: "If from the evidence you find, that prior to the time that the plaintiff Doyle fell into the lower deck starboard ballast hatch, lights had been placed around said hatch by the employees of the defendants, and that said lights were at said hatch before and at the time the plaintiff fell into the hatch, then and in that case your verdict should be against the plaintiff and in favor of the defendants." This instruction in effect told the jury that it made no difference whether the opening was illuminated or not; if the lights were placed there by defendants they were absolved from liability.

3. Contention is made that \$100 should have been stricken from the cost-bill. This allowance was made by virtue of subdivision 6 of "An Act to regulate Fees in the City and County of San Francisco, approved Feby. 9, 1866" (Stats. 1865-66, p. 68), which is as follows: "The prevailing party shall be allowed five per cent on the amount recovered, together with any sum by him so paid in a cause, as costs and disbursements, to be included in the judgment against the adverse party; provided said five per cent shall be allowed only in litigated cases and said percentage shall not be allowed to exceed \$100 in any one judgment." The validity of the statute has been upheld in *Corwin v. Ward*, 35 Cal. 198, [95 Am. Dec. 93]; *Whitaker v. Haynes*, 49 Cal.

597; *Fanning v. Leviston*, 93 Cal. 188, [28 Pac. 943]; *Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 114, [38 Pac. 635]. But it is claimed that it has been repealed by the statute passed in 1895 entitled, "An Act to establish the fees of county, township and other officers and of jurors and witnesses in this state." (Stats. 1895, p. 268.) The statute of 1895 does not, however, in express terms nor by implication repeal subdivision 6 of the act of 1866. The title of the act of 1895 does not purport to affect the question of costs in litigated or other cases. The reasoning of the supreme court in the case of *Hilton v. Curry*, 124 Cal. 84, [56 Pac. 784], seems decisive of this question in favor of respondent.

There is no other point requiring attention.

The judgment and order denying the motion for a new trial and the order denying the motion to strike out the \$100 percentage from the cost-bill are affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 22, 1907.

[Civ. No. 808. Second Appellate District.—February 28, 1907.]

D. D. SNYDER, Respondent, v. A. J. REGAN, Appellant.

ACTION AGAINST PRIOR LESSEE OF STORE—WRONGFUL WITHHOLDING FROM SUBSEQUENT LESSEE—DAMAGES—DEFENSE—SETTLEMENT OF PRIOR SUIT AGAINST LESSOR—INSTRUCTION—SUPPORT OF VERDICT. In an action by a subsequent lessee of a store to recover damages against a prior lessee for the wrongful withholding thereof after the term, in which defendant pleaded in bar a prior action to recover the same damages against the lessor, which was settled and dismissed upon the lessor's payment of costs and plaintiff's attorney's fees, where the court instructed the jury that if they found that the actual damages sued for against the lessor had entered into the settlement and dismissal of the prior suit, plaintiff could not recover them against the lessee, and the jury found a general verdict for the plaintiff for the actual damages claimed against the prior lessee, such verdict amounts to a finding that such actual

damages were not included in such settlement, and there being evidence to support it, the verdict will not be disturbed upon appeal.

ID.—COMPETENCY OF EVIDENCE AS TO SETTLEMENT—RECEIPT IN GENERAL TERMS—RELEASE OF ALL CLAIMS.—It was competent to show what matters entered into the settlement and dismissal of the prior suit against the lessor, even though the receipt in general terms released the lessor from all claims of damages against him.

ID.—PLEADING—OWNERSHIP OF BUSINESS DAMAGED.—An averment that plaintiff was a merchant in the city where the storeroom was leased, and conducted a store business in that city, and that in view of increasing his business he leased the storeroom wrongfully withheld, and was injured in his business because he could not remove his goods thereto, is a sufficient averment of the ownership of the business damaged as against a general demurrer.

ID.—DEPRECIATION IN VALUE OF GOODS TO BUSINESS.—An averment that "the goods depreciated in value to plaintiff's business," sufficiently alleges a loss to the business conducted by plaintiff, in relation to such goods as he would have been enabled to sell but for the tortious acts of defendant.

ID.—SUPPORT OF VERDICT—CONFLICTING EVIDENCE AS TO OWNERSHIP AND DAMAGE.—Where there was a conflict of evidence as to plaintiff's ownership of the business, and as to whether the damages thereto could have been avoided by the use of ordinary diligence, as well as to the amount of damages suffered on account of the various items specified in the complaint, and as to whether his goods actually depreciated in value, to his injury, and there was some testimony to support the verdict for plaintiff, it is conclusive as to all such questions.

ID.—ITEMS OF DAMAGE—REVIEW UPON APPEAL.—Where the agreed proof is such as to warrant the jury in determining generally the damage to the extent found by them in their verdict, it is not incumbent upon the appellate court to enter upon a calculation as to the elements of damages, and what may or may not have been considered, or the weight or effect which was given to any particular testimony as to items of damage, nor to examine the items to determine whether the jury considered some small item, where the testimony was very slight.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order denying a new trial.
E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

Wm. Shipsey, for Appellant.

S. V. Wright, for Respondent.

3 Cal. App.—5

ALLEN, P. J.—Action to recover damages for wrongfully withholding possession of certain premises. Verdict and judgment for plaintiff, from which judgment, and an order denying a new trial, defendant appeals.

The action was brought by plaintiff, the lessee of a certain storeroom in the city of San Luis Obispo, whose lease thereof commenced September 1, 1903. The defendant as a prior lessee, whose lease expired at the date last named, was in possession, and, notwithstanding the expiration of his lease, refused to surrender the same, but continued in possession until September 23d of that year. Plaintiff, relying upon his lease, made purchases of goods most marketable at that point in the month of September, and which were duly received about September 1st, but by reason of defendant's acts it became necessary to store the same at an expense to plaintiff; and other goods were delayed in consignment because of plaintiff's inability to furnish storeroom therefor, and a loss ensued to plaintiff by not being able to display and sell the said goods during September. That in consequence of the expected removal, plaintiff disarranged his store then occupied by him so as to seriously interfere with his business during the time that defendant wrongfully held possession of the other store; and suffered other losses specifically set out in the complaint. Afterward, in November, 1903, plaintiff commenced an action against the lessor to recover damages for breach of contract by reason of his failure to deliver possession of the premises. In that complaint most of the items of damages were identical with those set out in this action. That action against the lessor was dismissed under an agreement by which the lessor paid the costs of court, and the attorney's fees for the preparation and filing of the complaint, estimated at \$45.25. Defendant in this action pleaded such settlement and dismissal as a bar to this action, claiming that all questions of actual damage accruing to plaintiff had once been satisfied and paid.

The trial judge instructed the jury that if they should find that such actual damage had entered into the settlement of the action against the lessor and plaintiff had received a valuable consideration on account of such settlement and dismissal, that plaintiff could not again recover the amount of such actual damages from defendant; and, further, that the adequacy of such payment was not material; that the ques-

tion was, Did plaintiff receive any sum in settlement of the actual damages suffered by him?

The verdict, which was a general one in favor of the plaintiff, by implication, amounts to a finding that such actual damages had not been the subject of such settlement. There was evidence to support such finding, and it will not be disturbed upon appeal.

It was competent to show what matters entered into the settlement and dismissal, even though the receipt in general terms released the lessor from all claims of damages against him. (*Jersey Island Dredging Co. v. Whitney*, 149 Cal. 269, [86 Pac. 691].)

There was a conflict of evidence with reference to the ownership of the business, and as to whether the damages could have been avoided by the use of ordinary diligence, as well as to the amount of damages suffered on account of the various matters specified in the complaint. But as to all of such matters there is some testimony warranting the jury in its finding, and under the well-established rule, the verdict of the jury is determinative of all such questions. Appellant, however, insists that the complaint itself does not aver ownership in the goods or business alleged to have been injured. We find an allegation that plaintiff was a merchant in the city of San Louis Obispo, and conducted a store business at that place and was desirous of increasing his business, in view of which he entered into a lease for the premises by which plaintiff rented said storeroom, and was injured in his business because he could not remove his goods thereto. As against a general demurrer this is a sufficient averment of ownership of the business intended to be carried on in said leased premises. A statement of facts which indicates with reasonable certainty actual ownership is the equivalent of an allegation of the ultimate fact.

It is next contended as to one of the allegations of damages, namely: as to the depreciation in value of certain goods, that the allegations of the complaint are insufficient to entitle plaintiff to the recovery of such item. The allegation is that "the goods depreciated in value to plaintiff's business." It is argued that this is not a sufficient allegation of depreciation to authorize a recovery; that a recovery can be had only for the actual market depreciation, which, it is claimed, is not shown in the record. We accept this allegation of injury

on account of the depreciation in value to the business as sufficient to allege a loss to the business conducted by plaintiff in relation to such goods as he would have been enabled to sell but for the tortious acts of defendant. It was for the jury to say whether such goods actually depreciated in value to the injury of plaintiff and his business, which it has determined adversely to the appellant. When there is some testimony in the record sufficient to sustain a verdict, it is not incumbent upon us to enter upon a calculation as to the elements of damage and what may or may not have been considered, or the weight or effect which was given to any particular testimony in connection with such items of damage. Nor will we enter into an examination of the items entering into the verdict to determine whether the jury considered some small item where the testimony was very slight, when the general proof is such as to warrant a jury in determining generally the damage to the extent found by them in their verdict.

There is nothing in the record indicating passion or prejudice; nor was there anything in the conduct of respondent's counsel which could have had the effect of prejudicing an intelligent jury. Taking the whole record, we are satisfied that the verdict was a fair one; that the charges of the court were proper, and that there is no prejudicial error in such record.

The judgment and order are affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 281. Third Appellate District.—February 23, 1907.]

J. W. WATKINS and W. B. THURMAN, a Copartnership, etc., Respondents, v. FRANK GLAS, Jr., and W. H. GLAS, Appellants.

PARTY-WALL—CONTRACT FOR CONTRIBUTION—PLEADING—GRAVAMEN OF COMPLAINT.—In an action to recover one-half of the cost of the erection of a party-wall, under a written contract to contribute one-half thereof to the one actually building the wall, the gravamen of the complaint is the building of the wall by one coterminal owner, and the use thereof by the other, without contributing his part of the cost of erection.

- ID.—PAYMENT OF COST OF WALL IMMATERIAL.**—It is not necessary to aver that the party erecting the wall has paid the cost of its erection, before the action for contribution under the contract therefor is brought, nor is it a defense that plaintiff has not paid the cost of erection to the builder employed to erect it.
- ID.—UNCERTAINTY IN PLEADING—GENERAL DEMURRER.**—Where the complaint is sufficient as against a general demurrer, the fact that some of its averments are uncertain cannot be considered where no special demurrer for uncertainty was interposed.
- ID.—SUFFICIENCY OF COMPLAINT—PARTY-WALL AGREEMENT—APPRAISEMENT OF COST BY AGREED ARCHITECT.**—A complaint which alleges the agreement of the parties to bear an equal proportion of the expense of the erection of the wall, that it was erected by one of them, that the cost thereof was appraised by the architect agreed upon between the parties, and the notification to defendants of such appraisal, and alleges that defendants are making use of the wall, and have not paid their share of the burden of its erection, is sufficient as against a general demurrer.
- ID.—RELATION OF DEBTOR AND CREDITOR—ASSIGNABILITY OF RIGHT OF ACTION.**—The complaint shows the relation of debtor and creditor between the parties, and the party erecting the wall became vested with a right of action against the other party, which was assignable, and enforceable by the assignees, subject to any defense or counterclaim against the assignor.
- ID.—DEFENSE UNPROVED—CONCLUSIVE FINDING.**—Where no evidence is offered upon a defense pleaded, the finding that the allegations of such defense are untrue is unassailable.
- ID.—ORDER OF PROOF—OPENING OF CAUSE—MOTION OF DEFENDANT—JUDGMENT PLEADED IN ABATEMENT AND IN BAR—DISCRETION.**—Where the *onus* was upon plaintiff to prove the averments of the complaint denied by the answer, the court properly exercised its discretion in denying a motion of defendant to open the case first by proving a former judgment pleaded in bar and in abatement of the action. The proper time for such proof was after plaintiff had proved his case; and where defendant then failed to make such proof, the plea cannot be considered.
- ID.—EVIDENCE—CONTRACT BY CORPORATION WITH PLAINTIFF TO BUILD WALL—ASSIGNMENT BY CORPORATION—PRIMA FACIE EXECUTION.**—A contract between a corporation, party to the party-wall agreement, and the plaintiffs to construct the party-wall was admissible to show the fact of its construction thereunder; and the assignment by the corporation to the plaintiffs, executed by its president and secretary, and attested by its corporate seal, was a *prima facie* showing of a due execution thereof, which was sufficient, in the absence of other evidence overcoming it.

ID.—ERROR IN AGREED APPRAISEMENT—BURDEN OF PROOF.—If there was any error or mistake in the agreed appraisement, which appears to have been conducted in accordance with the terms of the party-wall agreement, the burden was upon the defendants to show it.

ID.—SUPPORT OF FINDINGS AND JUDGMENT.—*Held*, that the evidence sufficiently supports the findings and sustains the judgment for plaintiffs.

APPEAL from a judgment of the Superior Court of Madera County, and from an order denying a new trial. M. L. Short, Judge.

The facts are stated in the opinion of the court.

W. H. Larew, for Appellants.

Francis A. Fee, for Respondents.

HART, J.—The plaintiffs brought this action to recover from the defendants the sum of \$475 alleged to be due under an agreement for the erection of a party-wall. The plaintiffs, it is alleged, became the owners of the claim against the defendants under an assignment of the same to them by Wehrman & Meilikie, a corporation, incorporated and organized under the laws of California. Wehrman & Meilikie, in their corporate capacity, and the defendants were the owners, respectively, of adjoining lots in Block No. 40 of the town of Madera, in the county of Madera. Having in view the erection of brick structures, with a party-wall on the line of their respective properties, upon said lots, the said corporation and the defendants, on the ninth day of October, 1903, entered into an agreement in writing, by the terms of which said parties were to bear in equal proportion the actual cost of the erection of such party-wall. This agreement is made a part of the complaint and is inserted *in haec verba* in the findings.

On the thirty-first day of October, 1903, the said Wehrman & Meilikie, corporation, entered into a written contract with plaintiffs, by the terms of which the latter agreed for and in consideration of the sum of nineteen hundred and three (\$1903) dollars, to erect and complete within a certain designated period of time, on the land of said corporation mentioned in the said party-wall agreement, a one-story brick building, 25x80 feet in dimensions, with "a party-wall on

the easterly side thereof, and being the party-wall referred to in the agreement of October 9th, 1903, aforesaid, and to furnish all of the labor and materials necessary for the erection, construction and completion of said building, including said party-wall." The complaint alleges that the said sum of \$1903 for which plaintiffs agreed to erect said building, did not include the defendants' one-half of the cost of the construction of the party-wall. The building, the erection of which was thus contracted for, was completed by the first day of February, 1904. Prior to the commencement of this action, the said corporation, Wehrman & Meilikie, in the language of the complaint, "by an instrument in writing, and under its corporate name and seal, and in pursuance of a resolution of its Board of Directors duly adopted and entered upon its minutes, authorizing the same, assigned and transferred to the plaintiffs its said account, claim and demand against the defendants, arising by reason of the construction of said party-wall as provided in said agreement of October 9th, 1903, together with all its rights to receive from said Frank Glas, Jr., and W. H. Glas, the one-half cost of said party-wall."

The facts of the transaction are fully set out in the complaint. A general and special demurrer to the complaint was overruled. The point urged under the special demurrer, involving the question of the running of the statute of limitations against the action, seems not to have been well taken, and, in fact, is not urged here. The complaint is verified.

The answer specifically denies the averments of the complaint, except that it admits that "the easterly wall of the building, erected by Wehrman & Meilikie, and referred to in the complaint as 'the party-wall,' was erected partly upon the lands of defendants and partly upon the lands of Wehrman & Meilikie," and then sets up a special defense, alleging that the party-wall was not so "constructed as to be useful and beneficial to the defendants equally with Wehrman & Meilikie, but, on the contrary, defendants allege that said party-wall, so-called, was not so constructed that the defendants could properly connect their buildings therewith," and then charges that "defendants' building afterward joined thereto (the party-wall) was badly cracked and damaged to the loss and damage of defendants in the sum of \$500," etc. The defendants also set up, by way of a special plea in bar, a judg-

ment alleged to have been made and entered on the seventh day of November, 1905, in their favor and against the plaintiffs, in an action in which these plaintiffs were plaintiffs and the defendants, Frank and W. H. Glas, and Wehrman & Meilikie, corporation, were defendants, "upon and on account of the same action set forth in plaintiffs' complaint herein; that said judgment was rendered and entered after the trial of the action upon its merits." The same judgment is pleaded in abatement of this action, and in this connection the answer alleges that said judgment is not final and the action, therefore, still pending, because the "six months within which an appeal may be taken therefrom" have not expired.

The party-wall agreement, which is the basis of this action, or so much thereof as is material to the controversy, reads: ". . . Now, therefore, in consideration of the premises it is agreed, that either the party of the first part (Wehrman & Meilikie) or the parties of the second part (defendants) may construct and complete the said party-wall, and it is agreed that if the party of the first part constructs and completes said party-wall, that the parties of the second part will, upon completion thereof, pay to the said party of the first part, the one-half ($\frac{1}{2}$) of the actual cost of the erection and completion of said party wall, *vice versa*, it is agreed that if the parties of the second part erect and complete the said party-wall, the said party of the first part will, upon completion thereof, pay to the parties of the second part, the one-half ($\frac{1}{2}$) of the actual cost of the erection and completion of said party-wall, and it is further agreed, that the westerly one-half of said party-wall shall be the property of the party of the first part, and that the easterly half of said party-wall shall be the property of the parties of the second part, and it is agreed that the value or actual cost of the erection and completion of said party-wall shall be fixed and determined by Julian Mourot, Architect of Modesto, California, and we agree to conform to and abide his decision and valuation of the same."

It is stated in the complaint that "after the completion of said building and said party-wall, and on or about the first day of February, 1904, said Julian Mourot did, in pursuance of said agreement of October 9th, 1903, ascertain and determine that the one-half of the cost of the erection and construction of said party-wall, was the sum of \$475," and

that defendants on or about the same date were notified that that sum had been by Mourot ascertained to be one-half of the actual cost of the party-wall. The answer does not traverse this allegation, but merely denies that the sum mentioned or any other sum is due or owing the plaintiffs on account of the construction of the party-wall.

Plaintiffs were given judgment, from which and from the order denying a motion for a new trial this appeal is taken.

Appellants contend that the complaint does not show that the corporation, or assignor of plaintiffs, had acquired any right from the defendants which they could assign. The right arising under the party-wall agreement is, it is claimed, the same as that accruing to a surety who, having satisfied the obligation of the principal debtor, may sue to require his co-sureties to contribute their shares of the burden, and that, therefore, the failure of the complaint to show that the assignor of the plaintiffs had actually paid the contractors for the entire cost of the party-wall and thus had paid out money for and on behalf of defendants on account of the cost of the erection of such wall, renders it amenable to the objections of the demurrer. In other words, it is urged that this is nothing less than an action by a surety against his co-surety for contribution, and that the complaint falls short of stating a cause of action because it does not appear therefrom that the assignor of plaintiffs has expended any money for which he is entitled to contribution or reimbursement by the defendants. In their opening brief, appellants state their position, and it may best be presented in their own language: "This is an action against the defendants to compel the payment of contribution by the defendants on account of a party-wall erected by the plaintiffs at the instance of Wehrman and Meilikie. It is settled law that an action for contribution will not lie until actual payment has been made by the party entitled to receive the contribution—in this case Wehrman & Meilikie, a corporation. Having actually paid nothing on account of the defendants, Wehrman and Meilikie could not themselves have maintained an action for contribution against the defendants. It follows they had no right of action to assign."

The first question is whether the court erred in its order overruling the demurrer. The complaint is not a carefully drafted pleading, for it is not altogether free from the criti-

cism of uncertainty. A special demurrer to this point was not interposed, however, and we think its averments and the manner thereof sufficient to withstand the attack of a general demurrer.

It is, of course, clear that the duty of contribution to which a coterminous owner of a party-wall may become liable and that of the contribution to which a surety is entitled at the hands of his cosureties upon his extinguishment of the obligation of the principal debtor both originate in the equitable consideration that those who have assumed a common burden ought to bear it equally. In the very nature of the case, as between cosureties, one is not entitled to contribution until he is damnified by actual payment and it is settled that he has paid more than his share. It is, in other words, only where one surety has discharged the entire burden that he is authorized to maintain an action against his cosureties to compel contribution of their just proportion of the obligation. In the case before us the same event, in principle, has occurred, which would authorize a surety to institute suit. As we have seen, in the principles from which the duty of contribution in both cases arises there is no distinction. The only difference perceivable between the two is in the manner of the discharge of the "principal obligation." As in the case of a surety suing for contribution he must necessarily plead and prove that he has discharged the principal obligation or paid more than his share of the debt, so in the case of the party erecting the wall he must plead and prove that he has erected the wall or caused it to be erected, and that the defendant has made use of it without contributing his part of the cost of its erection. In an action by a surety against his cosureties it would not for a moment be conceived to be necessary for him to allege that he had not borrowed the money with which to extinguish the common obligation. It would make no difference, so far as his cause of action was concerned, whether he had or not, and of course it could be no defense against his claim to say that he had. So, in an action for contribution for a party-wall, we do not understand it to be required that the plaintiff shall allege that he has actually paid the cost of the erection of the wall, and we do not apprehend that it would be a defense against such contribution to say that the party erecting the wall has not settled with or paid the builder for the labor and materials

bestowed upon its construction. In other words, in a suit for contribution by a surety against his cosureties, the gist of the action is essentially the payment by the plaintiff of the money due under the principal obligation. There is, of course, in such case no other cause for damnification than the fact of having been compelled to discharge a burden which it was not incumbent upon him to bear alone. On the other hand, in an action for contribution for a party-wall the gravamen of the complaint is the building of the wall by one and its subsequent use by the other coterminous owner. In such case, the injury or damnification suffered by the plaintiff is in the fact of having built the wall and its subsequent equal use without compensation by the defendant.

The complaint in the case before us alleges the agreement between the parties to bear an equal proportion of the expense of the erection of the wall. It alleges that the wall was erected by one of said parties—the assignor of the plaintiffs—and avers that the cost thereof was appraised by the architect upon whom the parties had agreed should perform that office, and the notification of defendants of such appraisement, and alleges that the defendants have made use and are making use of the wall, and have not paid their share of the burden of its erection. We think that this was sufficient to fortify the complaint against the attack of the demurrer. The allegations of the complaint show that by reason of the obligation flowing from the party-wall agreement the relation of debtor and creditor was established between the defendants and the corporation, and that the latter thereby became vested with a right of or chose in action against the former. It is not questioned that a thing in action is assignable, and it cannot be doubted that the corporation in this case had a right to assign its claim as a chose in action against the defendants to plaintiffs (Civ. Code, sec. 954; *Burlock v. Peck*, 2 Duer, 98), or that such a claim may be assigned either for a valuable consideration or for the purposes of collection, subject, of course, to any defense, setoff or counterclaim which might have been interposed in a suit upon the claim by the original owner. (Code Civ. Proc., secs. 368, 440.)

There are other specifications of error, some of which involve the point we have been discussing and of which we have disposed against the contention of appellants. There was no proof offered upon the special defense that the wall was so

defectively constructed as to have caused damage to the building of defendants by adjoining the building to the wall, and there is, therefore, no attack upon the finding of the court that the allegations of such special defense are untrue. It is urged that the court erred in refusing to permit appellants to introduce in evidence a certain judgment in support of their special pleas in abatement and in bar of the present action. The transcript shows the following proceeding upon this point: "The defendants moved the court that they be permitted to open the cause by introduction of evidence in support of their plea in abatement and plea in bar. The motion was denied by the court, and defendants excepted." The ruling was proper. (Code Civ. Proc., sec. 607.) Trial courts, in the exercise of their discretion, may depart from the orderly procedure prescribed by that section for the conduct of a trial; but error cannot ordinarily be predicated upon their refusal to do so. The onus was, of course, upon the plaintiffs to prove the issue tendered by the pleadings, and the court was proceeding only in the orderly way when it refused to grant the motion of counsel, and required plaintiffs to first present their case. No effort was subsequently made during the progress of the trial to introduce the alleged judgment in evidence. The proper time for its offer was after the plaintiffs had closed their case. We cannot speculate as to what the ruling of the court might have been had the judgment been offered in evidence at the proper time. If it had been pertinent to the issue raised by the special pleas set up by the answer no doubt it would have been admitted.

The contract between the corporation and the plaintiffs for the construction of the building of the former was admitted in evidence, over an objection that "the evidence was irrelevant, incompetent, immaterial and contained nothing tending to establish a right of recovery in the plaintiffs." The contract contains, of course, a provision specifying the extent of the work to be done, and shows that under its terms the contractors were to erect the party-wall in question. As a circumstance tending to show the fact of the construction of the wall by the contractors under their contract with the assignor of plaintiffs, the instrument was properly admitted in evidence. Nor is there any force in the objection to the admission in evidence of the assignment to plaintiffs by Wehrman & Meilikie of the claim against the defendants. The spe-

cific objection to this evidence is that "no assignment was proven in the manner required by section 1940 of the Code of Civil Procedure." The assignment was signed by the president and secretary of the corporation and attested by its corporate seal. This was a *prima facie* showing of the due execution of the instrument, and in the absence of other evidence overcoming it was sufficient. There was no proof offered by the defendants that the assignment was not what it purported to be.

The attack upon the appraisal of the cost of one-half of the erection of the party-wall by the architect agreed upon by the parties cannot be sustained. Defendants were notified of the appraisal made by the architect at or near the time the same was made. There is no challenge of this appraisal in the answer, nor was there any evidence offered in support of the objection here made to it. The facts as disclosed by the pleadings and the evidence do not sustain appellants in the declaration that the appraisal is void upon its face. It appears to have been conducted substantially in accordance with the terms of the party-wall agreement. If there was any error or mistake prejudicial to the defendants by such appraisal, the burden was upon them to show it. This they have not done.

The fourth finding of the court is assailed upon the ground that there is no evidence in the record to sustain it. The part of the finding to which objection is made is that the one-half of the cost of erecting and completing said party-wall to be borne and paid for by the defendants "was not a part of said consideration sum of \$1903, but was in addition thereto." The "consideration sum of \$1903" referred to is the amount for which the contractors agreed to erect the building of the corporation. The contention of appellants is that there is no evidence to warrant the finding. There is considerable discussion in the briefs upon this point, the basis of which is the affirmation of the fact by the plaintiffs and its denial by the defendants in the pleadings. And it might be suggested that the position of counsel for defendants upon this question, considered in connection with his contention as to the prerequisites necessary to establish a right of action in the assignor of plaintiffs, is disingenuous. If, as he contends, the item of the half of the cost of the construction of the party-wall, to be borne by defendants, was included in

the consideration price of \$1903 paid by the corporation for the construction of its building, what becomes of his position attempted to be maintained both upon the demurrer and upon a review of the evidence that the assignor of plaintiffs had acquired no right of action, and consequently nothing that it could assign, because it had paid nothing for defendants on account of their half of the cost of the party-wall? But in our view of the case and of the legal relations existing between the parties, as heretofore expressed, the proposition is immaterial. We have held that the erection of the party-wall by the assignor of plaintiff and the subsequent use thereof by the defendants created a liability in favor of the former against the latter. This, as we have endeavored to explain, was upon the theory that the contractors, having under their contract with their assignor constructed the building of the corporation, including the party-wall, could legally look to no one for compensation for the entire wall but the corporation. Its buildings having been erected previous to the construction of the building of the defendants, it was necessary for it to build the entire wall. It is, therefore, in our conception of the case, unimportant whether or not the half of the cost of the wall to be paid for by the defendants was included in the "consideration price of \$1903" for the erection of the building of the corporation, for, as we have said, the fact remains that, in any event, so far as this record shows, the corporation was legally bound to pay for the erection of the entire wall. The contract for the construction of the corporation's building contained a proviso to the effect that the cost of one-half of the party-wall was to be paid for by defendants. The record does not disclose the specific reason why that proviso was inserted in the contract between the plaintiffs and the corporation. The testimony of J. W. Watkins, one of the plaintiffs, shows that the contracts for the erection of both buildings were awarded at about the same time. Plaintiffs did not secure the contract for the erection of the building of the defendants. If it were important to find the reason, the insertion of that proviso in the contract might be accounted for upon either one of two theories; the one that the parties to that contract were under the belief that the plaintiffs would also secure the contract for the erection of the building of the defendants; the other, that the proviso was designed as an assign-

ment to plaintiffs of the claim of the corporation against the defendants for the latter's half of the cost of the wall. But whatever may have been its purpose, or the reason for its insertion in the contract, we repeat that we are of the opinion that the fact which the proviso, as is claimed by respondents, tends to prove, is of no importance or materiality—that is, the fact of whether or not the item of the half of the cost of the wall to be borne by the defendants was included in the sum of \$1903.00, paid by the corporation to plaintiffs for the construction of its building. If, however, the finding is of any importance, we think the testimony of Mr. Watkins sufficiently supports it.

There are no other assignments of error, except that it is declared in a general way that the evidence does not sustain the judgment. All of the evidence, with the exception of that of Mr. Watkins, was of a documentary nature. There was no evidence offered by the defendants. We think the judgment is well supported by the evidence. We have reached a conclusion in this case upon a somewhat different theory from that presented by the attorneys in their briefs. We have preferred to confine ourselves in the determination of the principal point in issue to a consideration alone of the history of the entire transaction as disclosed by the record evidence. It is clear that the wall was erected by the plaintiffs under a contract with their assignor. It is of course equally clear that the plaintiffs are entitled to their pay for the work, and that the defendants should, from every consideration of equity and fair dealing, under the circumstances presented by the record, be required to pay their just proportion of the expense incurred in the erection of the wall, cannot be disputed.

The judgment and order are affirmed.

Burnett, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 23, 1907.

[Civ. No. 313. Second Appellate District.—February 25, 1907.]

MAIER PACKING COMPANY, Appellant, v. MARGARET T. FREY, Administratrix of Estate of C. DAVID FREY, Deceased, Respondent.

ESTATES OF DECEASED PERSONS—CLAIMS—SUFFICIENCY OF AFFIDAVIT ON BEHALF OF CLAIMANT.—An affidavit to a claim against the estate of a deceased person, made by some other person, acting on behalf of the claimant, must state the reason why it is not made by the claimant; and if it fails to do so, it is insufficient.

ID.—AFFIDAVIT BY OFFICIAL ON BEHALF OF CORPORATION.—An affidavit to a claim on behalf of a corporation must state that it is a corporation, and the averment of that fact shows a sufficient reason why it is not made by the corporation. Where that fact is not stated, the claimant cannot be assumed to be a corporation; but if it is stated, the affidavit by an official should show that the person acting in its behalf is an officer of the corporation presumed from his official position to have sufficient knowledge of its affairs.

ID.—AFFIDAVIT FOR CORPORATION BY OTHER PERSON.—An affidavit on behalf of a corporation by other than such official must contain averments tending to show, when he swears that there are no offsets to his knowledge, that the nature of his relation to the company is of a character calculated to place him in possession of requisite information on that subject.

ID.—AFFIDAVIT BY OR ON BEHALF OF INDIVIDUAL.—When the affidavit is made by an individual who bases his claim upon transactions with the deceased, the law imputes to him knowledge of the truth of the averments made therein. When made by another on his behalf, the affidavit must, in addition to averring that he has no knowledge of any offsets, aver facts showing that he was in a position to know of them if any existed.

APPEAL from a judgment of the Superior Court of Los Angeles County. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Jones & Weller, for Appellant.

John H. Foley, for Respondent.

SHAW, J.—Appeal from judgment. Maier Packing Co. instituted suit upon a claim against the estate of one C.

David Frey, deceased, of which respondent was the administratrix. The claim and affidavit in support of it was attached to and made a part of the complaint. A demurrer interposed by defendant was sustained upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. Plaintiff declined to amend, and judgment was thereupon entered in favor of defendant, from which this appeal is prosecuted.

The claim was allowed by the administratrix, but rejected and disallowed by the judge of the superior court to whom it was presented for approval.

The only question involved is whether or not the affidavit to the claim complies with the requirements of section 1494, Code of Civil Procedure, which provides that "every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or someone in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. . . . When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant."

The affidavit in question is as follows:

"State of California, County of Los Angeles—*sa*.

"Maier Packing Co., by Simon Maier, Pres., whose foregoing claim is herewith presented to the administrator of the estate of said deceased, being duly sworn, says, that the amount thereof, to-wit: the sum of \$962.09, is justly due to said claimant, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the claimant or affiant.

"MAIER PACKING CO.,

"SIMON MAIER, Pres.

"Subscribed and sworn to before me, this 15th day of June, 1904.

"Sam'l Prager, Notary Public in and for Los Angeles County, Cal."

It appears both from the affidavit and the account constituting the claim that Maier Packing Co. is the claimant. The affidavit is made by Simon Maier on behalf of the claim-

ant, and under the section above quoted we must look to the affidavit for the assignment of some reason which will excuse claimant from making the same. The absence of such an averment has been held to be absolutely fatal. (*Perkins v. Onyett*, 86 Cal. 348, [24 Pac. 1024].) There seems to have been no attempt to state in positive terms any reason why Maier Packing Co. did not make the affidavit. Counsel for appellant, however, assumes claimant to be a corporation, and then contends that a corporation cannot swear; that it must necessarily act through some one as its agent. This is true, and it follows that where an incorporated company presents a claim against the estate of a deceased person an averment of the fact that claimant is a corporation constitutes a sufficient reason why the affidavit is not made by the claimant. The affidavit before us does not disclose the capacity or character in which claimant appears; there is no statement in it from which we can conclude that Maier Packing Co. is an incorporated company, and in the absence of some averment setting forth such fact, we cannot assume that it is a corporation.

The affidavit is defective in not assigning some reason which would relieve claimant from making it.

Where the claimant is a corporation, it should appear from the affidavit that the person acting on its behalf is an officer thereof, presumed from his official position to have sufficient knowledge of its affairs; or, if made by other than such official, it should contain averments tending to show, when he swears that there are no offsets to his knowledge, that the nature of his relation to the company is of a character calculated to place him in possession of the requisite information upon the subject.

Where the affidavit is made by an individual, who bases his claim upon transactions had with deceased, the law imputes to him knowledge of the truth of the averments contained in his affidavit. When made by another on his behalf, such person should, in addition to averring that he has no knowledge of any offsets, aver facts showing that he was in a position to know of them if any existed. These claims, when allowed, approved and filed, partake of the nature of a judgment, and as such are to be paid in due course of administration, and the affidavit should set forth facts sufficient to

at least make out a *prima facie* showing that the claim is justly due from the estate over and above all offsets.

We have examined the authorities cited by appellant, but in view of the decision in the case of *Perkins v. Onyett*, 86 Cal. 348, [24 Pac. 1024], as well as the evident purpose of the section, we must hold that they are inapplicable to this case.

We find it impossible to reconcile the provisions of this affidavit with the requirements of the statute, and the judgment appealed from is, therefore, affirmed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 243. Third Appellate District.—February 25, 1907.]

LEWIS H. BISHOP, Appellant, v. LEN D. OWENS et al.,
Respondents.

**INJUNCTION—DISSOLUTION OF TEMPORARY ORDER—ABORTIVE APPEAL—
APPEAL FROM JUDGMENT UPON DEMURRER.**—A notice of appeal from an order denying plaintiff's motion for a temporary injunction, where the record shows that the temporary injunction was granted, is abortive as an appeal from an order dissolving the same; but where a general demurrer to the complaint was sustained, and final judgment was rendered thereon, from which an appeal is taken, it is immaterial whether or not an appeal was intended to be taken from the order dissolving the temporary injunction, because, if the facts stated are insufficient under the general demurrer to warrant final relief, they are insufficient to warrant the continuance of the temporary restraining order.

ID.—INSUFFICIENT COMPLAINT FOR INJUNCTION—GENERAL CONCLUSIONS.—A complaint for an injunction which does not state facts sufficient to determine how plaintiff's property will be permanently injured by the acts complained of, and which states merely general conclusions as to multiplicity of suits and irreparable injury, not warranted by any pleaded facts, does not state facts sufficient to constitute a cause of action for equitable relief to enjoin the acts complained of.

ID.—SUSPENSION OF LADDERS AND FALLS WITH ROPES ATTACHED FROM ADJOINING BUILDING—EASEMENT.—When the acts complained of consist in the suspension of ladders and falls with ropes attached

from an adjoining building, over and above plaintiff's roof, and the complaint fails to state the purpose thereof or to show how the continuation thereof would injure plaintiff's property, the mere averments that the continued trespass "will ripen into a right and easement on plaintiff's property" and will "constitute and create an obstruction to the free and peaceable use of the aforesaid property" are only the conclusions of the pleader.

ID.—REASON ASSIGNED BY COURT BELOW—DAMNUM ABSQUE INJURIA.—

Where it cannot be determined from the complaint whether or not the alleged acts are excusable under the rule of *damnum absque injuria*, applied by the court below, and the facts pleaded do not amount to a conjecture as to the purpose of the acts, we are not concerned with that particular reason assigned by the court for its ruling. It is sufficient that the ruling sustaining the demurrer was correct.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

Charles E. Naylor, and William P. Hubbard, for Appellant.

Henry C. McPike, for Respondents.

HART, J.—Suit brought for an injunction to restrain certain acts complained of by plaintiff. A preliminary injunction was granted upon the verified complaint and an order to show cause why the same should not be made permanent. Defendants interposed a general demurrer to the complaint. On August 23, 1903, the court entered an order sustaining the demurrer, with leave to plaintiff to amend within ten days. The plaintiff failed to amend within the time allowed, and thereupon judgment was entered in favor of defendants herein. From this judgment plaintiff takes this appeal.

On the 8th of July, 1903, the court, upon motion and application of defendants, made an order upon the complaint alone dissolving the preliminary injunction and discharging the order to show cause. There is in the transcript a "Notice of Appeal from the order denying plaintiff's motion for a preliminary injunction, made and entered herein on the 1st day of July, 1903." But as the record shows that a preliminary injunction had been granted by the court, there is no ground upon which such an appeal may be presented. Pre-

sumably, it was designed to take an appeal from the order dissolving the temporary injunction. If so, the attempt was abortive. But as we think the court below committed no error in its order sustaining the demurrer, it becomes immaterial whether or not an appeal has been properly taken from the order dissolving the temporary injunction, because if the facts are insufficient under a general demurrer to state reasons for the final relief prayed for, certainly they were not sufficient to warrant the continuance of the temporary restraining order.

The stating part of the complaint alleges: "That all of said defendants repeatedly and continually are entering upon the roof of the building hereinafter named, and are engaged at the present time in hanging and suspending ladders and falls with ropes attached thereto from *an adjoining* building on the west of the aforesaid building, over and above the roof of the aforesaid No. 506 Market street and No. 7 Sutter street, and in the space above said roof, preparatory to continue and further enter upon said premises, and have and are threatening to continue daily, hourly, repeatedly and continuously to continue in the commission of said acts, and have threatened and are threatening to suspend other articles, materials and things therein.

"That all of said defendants, and each of them, threaten to and will, unless restrained by order of this court, continue to enter upon plaintiff's said described premises, and the whole thereof, repeatedly and continuously, daily and hourly, and that actions at law would afford plaintiff no plain, speedy and adequate remedy, for the reason that such trespasses will be so frequent and of interminable and numerous duration that such a multiplicity of suits will be necessitated thereby, and the injury resulting from each act of trespass would be so trifling in amount as compared with the expense and inconvenience of prosecuting actions at law to recover damages therefor, as to leave plaintiff without adequate remedy, and furthermore, such acts of the defendants, if permitted to continue, will in all probability result in a breach of the peace of this community, because unless defendants be restrained by the court, plaintiff must resort to necessary force in preventing the violations of his rights of property consequent upon such trespasses; and furthermore, such acts, if permitted to continue, will ripen into a right and an

easement on plaintiff's property aforesaid, and such imminent, threatened and actually pending acts of defendants as aforesaid do and will so constitute and create an obstruction to the free and peaceable use of the aforesaid property of plaintiff as to interfere with the comfortable enjoyment of said property, and will injuriously affect the said plaintiff in the reasonable possession thereof."

It is impossible to ascertain from the complaint exactly what the nature of the acts is which plaintiff charges interfere and will continue to interfere with the full and peaceable enjoyment of his property, and which, he alleges, will, if not restrained, crystallize into a "right and easement" on his property. We are not advised by his pleading whether a structure is to be constructed above the roof of his building, or whether the acts of defendants will result in the establishment of some mechanical or other contrivance that will cause a nuisance and consequently an interference with the comfortable enjoyment of his property, or will result in suspending some article over or near his roof that is likely to fall upon his building and thus damage it, nor, in fact, does he allege any fact or facts in such manner as to clearly inform us what acts the defendants have committed, or are committing or threatening to commit, which will result in permanent or irreparable injury to his property. The averment that the defendants are "repeatedly and continually entering upon the building *hereinafter* named," and "are engaged at the present time in hanging and suspending ladders and falls with ropes attached thereto from an *adjoining* building on the west of the *aforesaid* building, over and above the roof of the aforesaid No. 506 Market street and No. 7 Sutter street, and in the space above *said roof*," certainly furnishes no light by which we can determine how the plaintiff's property will be permanently injured.

The allegation that the plaintiff will be driven to a multiplicity of suits involving trivial amounts and will thus be put to vexatious, troublesome and expensive litigation, is a mere conclusion, having no support in the other pleaded facts. In *Gilbert v. Arnold*, 30 Md. 29, it is said: "A court will not grant an injunction to restrain a trespasser merely because he is a trespasser, yet it will interfere where the injury is irreparable, or where full and adequate relief cannot be obtained at law, or where the trespass goes to the de-

struction of the property in the character in which it has been held and enjoyed, or where it is necessary to prevent a multiplicity of suits." But "these grounds of the jurisdiction," says the editor of the American Decisions [footnote], page 500, volume 11, "when closely examined, resolve themselves into one—that of irreparable injury." The test for the determination of the question of whether or not a particular injury will be irreparable seems to be this: Will a verdict of damages at law afford complete compensation for it? If so, then the fundamental ground for invoking the power of equity is lacking—to wit: a want of adequate remedy at law. "But an injury resulting from trespass may be incapable of compensation in damages from a variety of reasons: 1. It may be destructive of the very substance of the estate; 2. It may not be capable of estimation in terms of money; 3. It may be so continuous and permanent that there is no instant of time when it can be said to be complete so that its extent may be computed; 4. It may be vexatiously persisted in in spite of repeated verdicts at law; 5. It may be committed by one who is wholly irresponsible, so that a verdict against him for damages would be entirely valueless." (*Jerome v. Ross*, 11 Am. Dec. 501 [footnote]). The question of whether irreparable injury will result from the trespass must, of course, depend and be determined upon the facts of the particular case. The court must be fully advised by the pleaded facts of what the acts of the alleged trespasser are so that it can readily be determined whether the injury complained of meets the criterion of "irreparable injury." "Before a court of equity will interfere to restrain a trespass it must appear that the injury to result from the trespass will be irreparable in its nature. And it is not sufficient simply to allege that fact, but it must be shown to the court how and why it will be so." (*Mechanics' Foundry v. Ryall*, 75 Cal. 602, [17 Pac. 703]; *Branch Turnpike Co. v. Board of Supervisors, etc.*, 13 Cal. 190; *Waldron v. Marsh*, 5 Cal. 120.) "The facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded." (*Carlisle v. Stevenson*, 3 Md. Ch. 499; *Pomeroy's Code Remedies*, 680, and cases there cited.) "... It will be observed that it (the complaint) contains only a general averment as to the injury caused or to be caused by the acts of the defendant. No facts are set out showing how or why the supposed injury would

be irreparable. But to obtain an injunction, when irreparable injury is relied upon, such a showing is necessary." (*California etc. Co. v. Union etc. Co.*, 122 Cal. 643, [55 Pac. 591].) Tested by the foregoing principles, we think the complaint falls short of stating a cause calling for the equitable relief demanded. The mere declaration that plaintiff's property "will suffer irreparable injury" and that a "multiplicity of legal actions" can be avoided by equitable interference is not, as we have said, enough.

In this case, while it is charged in paragraph 6 of the complaint that the defendants have threatened to continue committing the acts charged in paragraph 2, we are unable to determine from the complaint, as we have before suggested, how and in what manner and why the alleged threatened continuation of such acts would result in permanent and irreparable injury to the plaintiff. The mere allegations that the continued trespass "will ripen into a right and easement on plaintiff's property," and will "constitute and create an obstruction to the free and peaceable use of the aforesaid property" are only the conclusions of the pleader. The facts alleged do not, as they should, speak for themselves as to the nature and extent of the injury threatened. There is an allegation in the complaint, as we have seen, that the defendants are "engaged at the present time in hanging and suspending ladders and falls with ropes attached thereto from an adjoining building on the west of the aforesaid building, over and above the roof." The purpose of these "ladders and falls with ropes attached thereto" and the threatened suspension of "other articles, materials and things therein" is not disclosed by the complaint. In any event, as we have said, there is nothing in the averments from which we can determine how or why, if at all, these acts would cause irreparable injury to plaintiff's property. If we understand the complaint, the ladders, falls, etc., are not attached to and suspended from plaintiff's building, but to and from an adjoining building. Of course, if by clear and appropriate allegations it appeared from the complaint that the attachment of the ladders and falls to and their suspension from the building of an adjoining owner would interfere with and obstruct plaintiff's free, full and peaceable use of his property and in consequence would inflict upon him a permanent and an irreparable injury, to redress which there was

no adequate remedy at law, then and in such case plaintiff would be warranted in invoking the equitable remedy of injunction. But, to secure this remedy, as we have shown by the authorities, there must be a clear case disclosed by the pleaded facts of threatened irreparable injury which could not adequately be repaired by any of the existing legal remedies. If a full statement of all the facts and circumstances of the alleged trespass by the defendant upon plaintiff's property were clearly shown by the complaint (and surely they have not been), it might appear that the defendants "might be crowded out of the way by a *molliter manus imposit*" (*Mechanics' Foundry v. Ryall*, 75 Cal. 602, [17 Pac. 703]), or it might appear that the plaintiff is afforded a complete remedy at law.

In his reply brief, appellant complains that counsel for respondent, in his presentation of his side of the cause on this appeal, has abandoned the position taken by him in the court below. In the lower court, he says, the defendants argued that the facts stated in the complaint show that the acts of the defendants were protected under the doctrine of *damnum absque injuria*, and that it was upon that view and theory that the learned judge of the court below sustained the demurrer. The sufficiency of the facts to state a cause of action was necessarily challenged by the demurrer, whatever may have been the specific moving cause of the ruling. We cannot perceive, however, how, from the face of the complaint, it could be determined that the facts bring the acts charged within the rule of *damnum absque injuria*. As we have before observed, the purpose for which the alleged acts have been committed and are threatened to be continued is not disclosed by the facts stated in the complaint. Indeed, the pleaded facts do not even furnish ground from which a conjecture as to the purpose of the acts complained of might be ventured. We do not, therefore, see how it can be determined from the complaint whether the alleged acts of defendants were and are excusable under that rule or not. But we are not concerned with the particular reasons upon which the ruling in the court below was founded. It is enough for us to be convinced that the ruling was correct, and, being so convinced, the judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 23, 1907.

[Civ. No. 835. First Appellate District.—February 26, 1907.]

HENRY HUBBARD, Appellant, v. JUSTICE'S COURT OF SAN JOSE TOWNSHIP, SANTA CLARA COUNTY, Respondent.

PROHIBITION—REMEDY BY APPEAL—JURISDICTION TO TRY ACTION IN JUSTICE'S COURT.—A writ of prohibition will not lie to prevent the trial of an action where there is a plain, speedy and adequate remedy by appeal from the final judgment rendered therein. Whether a justice's court has or has not jurisdiction to try an action, where it appears that the summons was not served or returned within three years from the commencement of the action, the method of appealing from the judgment of the justice's court is simple and expeditious, and an appeal may be taken upon questions both of law and of fact; and prohibition will not lie in the superior court to prevent the trial of the action.

ID.—APPEAL—STIPULATION OF PARTIES—MOOT QUESTION.—Upon appeal to this court from a judgment of the superior court denying a writ of prohibition to the justice's court, the parties cannot by stipulation limit the inquiry in this court to the moot question, not arising upon the record, whether section 581 of the Code of Civil Procedure applies to justices' courts.

APPEAL from a judgment of the Superior Court of Santa Clara County, denying a writ of prohibition to the Justice's Court of San Jose Township. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

C. D. Wright, and Robert M. Wright, for Appellant.

Will M. Beggs, for Respondent.

HALL, J.—Appeal from a judgment denying application for writ of prohibition.

Appellant brought this action in the superior court of Santa Clara county to obtain a writ, prohibiting defendant from proceeding to try an action against appellant pending in the said justice court, and wherein, as appears by the record, summons was neither served on defendant in that action (plaintiff herein) nor returned within three years from the commencement of the action.

Appellant contends that as the summons in the action in the justice court was not served until after the expiration of three years from the commencement of the action, and was not returned at all, and as defendant in said action (plaintiff herein) never appeared in said action, save to move for the dismissal thereof, the said justice court is without jurisdiction to proceed further in said action, save to dismiss the same under subdivision 7 of section 581, Code of Civil Procedure.

Respondent contends that section 581, Code of Civil Procedure, has no application to actions in justice courts, and also that whether the justice court has or has not jurisdiction to try the action, the defendant in that action (plaintiff herein) has a plain, speedy and adequate remedy by appeal from any judgment that may be rendered against him, and therefore prohibition will not lie.

Prohibition is the proper remedy only in cases where the party aggrieved has no plain, speedy and adequate remedy in the ordinary course of law. (Code Civ. Proc., sec. 1103.)

The general rule is that the remedy by appeal is a defense to an application for a writ of prohibition, although the inferior court may have committed error in determining that it had jurisdiction. High on Extraordinary Legal Remedies lays down the rule in these words: "Thus, where the defendant in an action instituted in an inferior court pleads to the jurisdiction of such court, and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal in the final judgment in the cause." (Sec. 771.)

The same doctrine is upheld in the following cases: *Murphy v. Superior Court*, 84 Cal. 592, [24 Pac. 310]; *Strouse v. Police Court etc.*, 85 Cal. 49, [24 Pac. 747]; *Agassiz v. Superior Court*, 90 Cal. 101, [27 Pac. 49]; *Mines d'Or etc. v. Superior Court*, 91 Cal. 101, [27 Pac. 532]; *Jacobs v. Superior Court*, 133 Cal. 364, [85 Am. St. Rep. 204,

65 Pac. 826]; *Lindley v. Superior Court*, 141 Cal. 220, [74 Pac. 765]; *Cross v. Superior Court*, 2 Cal. App. 342, [83 Pac. 815].

In *Strouse v. Police Court*, 85 Cal. 49, [24 Pac. 747], the petitioner was being prosecuted on a criminal charge in the police court. In denying his petition for a writ, in which the point was urged that the police court had no jurisdiction, the court said: "If the petitioner should be convicted in the police court, he will have a plain, speedy and adequate remedy at law by an appeal to the superior court."

In *Agassie v. Superior Court*, 90 Cal. 101, [27 Pac. 49], the court said: "Petitioners had the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case, and such appeal being a 'plain, speedy and adequate remedy in the ordinary course of law,' within the meaning of section 1103, Code of Civil Procedure, prohibition does not lie. A remedy does not fail to be speedy and adequate because, by pursuing it through the 'ordinary course of law,' more time would be probably consumed than in the proceeding here sought to be used. And it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment." This case also quotes with approval the language above given from *Strouse v. Police Court*, *supra*.

In *Lindley v. Superior Court*, 141 Cal. 220, [74 Pac. 765], the petition was for a writ prohibiting the superior court from proceeding to the trial of an action in which the petitioner was defendant. The court said: "If, as contended, the superior court is without jurisdiction, there is of course, a remedy by appeal from any adverse judgment affecting petitioner, and it is not sufficient ground for interfering by prohibition that the trial will be expensive and troublesome." The writ was denied solely by reason of the remedy by appeal.

If the remedy by appeal from a final judgment of the superior court is plain, speedy and adequate, the appeal from a similar judgment in a justice court is equally so. The method of appealing from the judgment of a justice court is simple and expeditious, and if desired may be taken upon both questions of law and fact.

For the foregoing reasons, and upon the authorities above cited, we are constrained to hold that the appellant has a plain, speedy and adequate remedy by appeal from any judgment that may be finally taken against him, and for that reason prohibition will not lie.

In so holding we have not overlooked *White v. Superior Court*, 126 Cal. 245, [58 Pac. 450], nor *Keystone Driller Co. v. Superior Court*, 138 Cal. 738, [72 Pac. 398], in each of which the writ was granted to prohibit the trying of a case where summons had not been served and returned within the term of three years from the commencement of the action. In the *Modoc Land* case no question was raised or discussed as to the remedy; and in the *White* case the action in the superior court was to foreclose a mortgage, and the court seems to have laid stress upon the right of the petitioner to a present dismissal of the action and the removal of the lien by which his land was encumbered. But however that may be, both cases were cited to the court in the later case of *Lindley v. Superior Court*, 141 Cal. 220, [74 Pac. 765], where the rule is laid down as we have above indicated.

Neither have we overlooked the stipulation printed in the transcript to the effect that the only question to be submitted to this court is, "Does section 581 of the Code of Civil Procedure of the state of California apply to justice courts?" Counsel may not by stipulation submit questions of law for determination by this court which do not arise upon the record in the case. If, notwithstanding the justice court may not have jurisdiction to try the action against plaintiff, appellant has no right to the writ of prohibition because of his remedy by appeal, the question of jurisdiction becomes a moot question, and should not in this proceeding be determined by this court.

The judgment is affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 265. Third Appellate District.—February 26, 1907.]

H. F. HOBSON, Respondent, v. PACIFIC STATES MERCANTILE COMPANY, Appellant.

RECEIVER—EX PARTE APPOINTMENT—BASIS FOR DETERMINING VALIDITY—SUBSEQUENT PROCEEDINGS IMMATERIAL.—The validity of an *ex parte* order appointing a receiver must be determined by the proceedings upon which it was based; and, aside from any imperfection in the bond, any proceedings taken subsequently to the making of the order when a motion to vacate the order was noticed and heard, including an amended complaint then allowed to be filed, are wholly immaterial.

ID.—INSUFFICIENT COMPLAINT—OBJECT OF ACTION—APPOINTMENT OF RECEIVER OF INSOLVENT CORPORATION—WANT OF NOTICE.—Where the original complaint on which the order was based did not state a cause of action, and had for its object merely to appoint a receiver of a corporation, alleged on information and belief to be insolvent, and a receiver was appointed upon the verified complaint to take possession of all of the assets of the corporation without notice, the order has no validity and must be reversed.

ID.—APPOINTMENT MUST BE ANCILLARY TO PENDING CAUSE OF ACTION.—There is no such thing as an action brought merely for the appointment of a receiver. Such an appointment, when made, must be ancillary to a pending and independent cause of action, and its purpose is to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective.

ID.—JURISDICTION OF EQUITY—INSOLVENT CORPORATION.—A court of equity has no inherent power to appoint a receiver of an insolvent corporation merely because of its insolvency, or to wind up its affairs, in the absence of a statute; and no statute authorizes a private person, either as stockholder or creditor, to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to place its property in the hands of a receiver.

ID.—NOTICE REQUISITE AS A RULE—IRREPARABLE INJURY—TEMPORARY INJUNCTION.—As a general rule, the appointment of a receiver to take property out of one's possession without a trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice; and even in such extreme case a temporary injunction would usually be sufficient.

APPEAL from an order of the Superior Court of the City and County of San Francisco appointing a receiver. F. H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Riordan & Lande, for Appellant.

L. G. Carpenter, F. W. Sawyer, and H. F. Hobson, for Respondent.

CHIPMAN, P. J.—The prayer of the complaint is that plaintiff have judgment for \$4,525, and that a receiver be appointed upon the filing of the complaint to take possession of all the assets and property, books, papers and records of defendant, and that defendant be restrained from transferring any of its property, assets, books and records and from doing any further business. Before the court made any order and as required by the court, plaintiff on said day filed a bond in the sum of \$1,000, signed by plaintiff and one surety, though reciting the names of two sureties. It does not appear that this bond was approved. Thereupon and on the same day, and without notice to defendant, the court made the following order:

“From the verified complaint herein, good reasons appearing, and it appearing necessary and proper therefor it is hereby ordered that: Thomas J. Quinn be and he is hereby appointed Receiver herein to take into possession and safely keep until the further order of this court, all of the assets, property, money of whatever kind or nature, books, records, files and papers of the defendant herein, and until the further order of this court the defendant, its officers, managers and agents are restrained from disposing, transferring or removing any of its assets, property, books, files, records and accounts, and they and each of them and all other parties having property in their possession or under the control belonging to the defendant are hereby directed to deliver the same to said receiver.

“For the purpose of fully carrying out this order and the authority of the said Receiver, the said Receiver is hereby authorized to commence and institute any necessary action in any court for that purpose.

"The Receiver is hereby required to furnish on qualifying an undertaking in the sum of \$3000.00 and to take the oath required by law.

"Dated July 23rd, 1904.

"FRANK H. KERRIGAN,

"Judge.

"(Endorsed): Filed Jul. 23, 1904."

On the same day the receiver so appointed filed the required bond, which was on that day approved by the said judge. The complaint was verified and was filed on July 22, 1904. It alleged that defendant is a corporation organized under the laws of this state; that its object was the sale and issuance of contracts known as "Merchandise Contracts," a sample of which is appended to the complaint as exhibit "A" and made part thereof; that plaintiff is the owner and holder of three hundred and seventy-four of said contracts, all of which are in good standing. This contract purports to be an agreement on the part of the corporation to deliver to the holder or his assigns, upon his complying with the conditions stated therein, "merchandise of whatever description desired to the retail value of one hundred dollars." The company guarantees, upon redemption of the contract, to find a purchaser for the merchandise, should the holder wish to sell the merchandise, "for the amount of \$85 cash then and there." The holder is required and agrees to pay to the company the sum of \$50, as follows: Five dollars on delivery of the contract, one dollar and fifty cents weekly for thirty successive weeks, failing in which the contract becomes void and all payments made are to be forfeited to the company. If the weekly payments are fully paid the contract is deemed fully paid and nonforfeitable, "and when thereafter there shall be the full sum of one hundred dollars to the credit of this contract in the Redemption Fund of the company, the company will immediately, on the surrender to it of this contract, deliver to the holder thereof the merchandise hereinbefore mentioned." The contract provides further that the company shall retain "for its own use and all expenses" the initial payment of five dollars; also twenty-five per cent of the thirty weekly installments; also "place ten per cent in the reserve fund, and set aside the remainder of the installments paid on this and other similar contracts to the credit of the Redemption Fund. The money in said

Redemption Fund shall be used in the purchase of merchandise for delivery, as required in the fulfillment of this and similar contracts of the company." It is also provided that the contract "is written pursuant to a written application thereof signed by the holder which is hereby referred to and made part hereof," but this application is not set out nor are its provisions stated in the complaint.

The complaint next alleges: That "said business of said defendant is against public policy and as plaintiff is informed and believes and therefore alleges a fraud against the plaintiff and all contract holders"; upon information and belief it is alleged that the postoffice department has instituted proceedings against defendant to deprive it of the use of the mails, and that defendant has been "sued and attached on mature contracts and has been unable to meet its demands"; that defendant has caused two other corporations to be organized for the purpose of taking over its property "and placing itself insolvent," and unless restrained will transfer its property to prevent the holders of said contracts from realizing anything thereon; that many of said contracts are outstanding and the holders thereof "are becoming alarmed and are making great demands on defendant which are being refused"; plaintiff also alleges on information and belief that complaint has been made to the attorney general of the state requesting proceedings to be taken to revoke the license of defendant to do further business, and that before such action is taken defendant will dispose of all its assets and property in a manner to be of great loss to plaintiff and other contract holders; on information and belief also it is alleged that defendant is insolvent and cannot meet its obligations, and that "plaintiff believes" that defendant intends to sell as many contracts as it can and cause its insolvency to be circulated and thus discredit its ability to meet the demands upon it and cause holders to forfeit their contracts, and unless restrained and a receiver appointed to take charge of the business there will be a great many contracts declared void for nonpayment and the money paid thereon forfeited; that plaintiff has no information of the full indebtedness and liability of defendant, and that such information is contained in defendant's books and records, which, unless preserved by order of the court, will be destroyed or disposed of so as not

to be available as evidence; that there has been paid on plaintiff's said contracts the sum of \$4,525, which defendant "has had and received for the use and benefit of plaintiff and said contracts"; that "unless a receiver is appointed to take possession of the assets and property of defendant and its books, papers, vouchers, records as herein alleged, they will be lost to the plaintiff and all contract holders."

The bond for \$1,000 was objected to as being defectively executed (by whom and when objected to does not appear), and on July 28, 1904, by order of the court, a bond similar in all respects to the first one, duly executed by plaintiff and two sureties, was filed and approved by the judge in lieu of said first bond. It appears that on the day of his appointment, namely, July 23d, the receiver "entered into possession of the premises and offices occupied by the corporation defendant, and seized and took possession and control of all the assets and property of every kind and nature, books, papers, records, vouchers and all other property of every character pertaining to the business of said corporation and the officers duly authorized to take charge of the affairs thereof, the property and business of said corporation, and changed the locks on the offices and premises occupied by said company in the building known as 137 Montgomery street in the city and county of San Francisco, and permanently locked and closed said offices occupied and used by said corporation defendant and which constituted the principal and only place of business of said corporation defendant in said city and county."

On July 25, 1904, defendant duly served notice of motion to set aside the order appointing the receiver on the ground that the complaint does not state sufficient facts to constitute a cause of action, or entitle plaintiff to the relief prayed for or for the appointment of a receiver, and upon the further ground that there is no authority of law for the appointment of a receiver of defendant corporation upon the grounds stated in the complaint herein, and the court was without jurisdiction to appoint said receiver. The court shortened the time within which to serve notice of said motion to two hours and defendant duly served the same upon plaintiff on July 25th, and simultaneously therewith also served on plaintiff a copy of the answer to the complaint.

In its answer defendant denies specifically each and every of the allegations of the complaint and avers that plaintiff has caused assignments of said contracts to be made to him for the purpose of this action, but none of said assignments has or have been registered with defendant as required by said contracts and all like contracts; that not less than ninety-seven per cent of the contract holders who have assigned their contracts to plaintiff as by him alleged have not paid the full amount required by them to be paid under the terms of said contract, and "said contracts are not fully paid and have not matured with the exception of probably six"; that said contracts are payable only "when there shall be the full amount of one hundred dollars to the credit of said contract in the redemption fund of the company, and not before, as said contracts in express terms stipulate and provide"; that prior to the delivery or execution of said contracts, or any of them, each holder signed a written application of the form set out in the answer. This application purports to be an application in which the proposed purchaser agrees to make the payments as set forth in the contract under penalty of forfeiture, and declares that the application is made with full knowledge of all the provisions of said contract and published literature of the company, all of which terms and conditions the purchaser agrees to. The motion came on to be heard on the 25th and at the hearing thereof "there was used, heard and considered the said complaint herein, the said notice of motion to set aside said order and the said answer of defendant." The matter was taken under advisement, and "on July 27th the plaintiff served and filed in said cause the following papers and pleadings, to wit, notice, affidavits, order, motion to amend and amended complaint." These papers were filed by leave of court and over the defendant's objection, and thereupon the court, "upon the consideration of all the papers on file herein, including said amended complaint, denied said motion to vacate said order appointing said receiver herein, and by the order of said court duly entered in the minutes thereof continued said receiver in the use, occupation, possession and control of the property and premises of said corporation defendant, by the order of said court to such effect." The papers filed by plaintiff on the 27th of July, and which were heard upon defendant's motion, do not appear in the transcript.

On July 28th defendant duly served notice of appeal from said order appointing said receiver and upon the same day and upon application, the amount being fixed by the court, defendant filed its stay bond on appeal in the sum of \$5,000, which was duly approved by the court, whereupon the court ordered "that all proceedings under said order appointing said receiver are hereby stayed," and further that said receiver surrender possession to defendant of all the property held by him under said order and to "desist from doing any further act as such receiver."

The order from which defendant appeals was made without notice to defendant, upon the verified complaint alone; the first notice defendant had of the order was when the receiver took possession of its books and other property and its place of business, locked up the premises and carried away the key. The bond given by plaintiff at the time was subsequently declared by the court to be so defective as to require another bond to be given in lieu thereof, which was not done until five days later. When the receiver took possession of defendant's place of business and its books, records and other property, his only authority was the *ex parte* order of the court concededly issued upon the original complaint, supported by a defective bond which, had it been in all respects good and sufficient, may have been wholly inadequate to damnify defendant for the damage in executing the order. But aside from any imperfection in the bond we know of no authority, statutory or otherwise, that warranted the court in making the order complained of. We regard the proceedings taken subsequent to the making of the order, when the motion to vacate it was noticed and heard, as wholly immaterial and in no wise affecting the question now before us. The validity of the order must be determined by the proceedings upon which it was based. We have set out these subsequent proceedings because they are part of the record and are claimed by respondent to have some bearing upon the question presented, but we fail to see in what respect they can be used to validate an order previously made by the court upon grounds then only in existence.

The facts stated in the complaint do not constitute a cause of action and are not claimed to have been stated for any purpose except for the appointment of a receiver. Respondent says in his brief that the action is not to enforce an il-

legal contract, but "is to distribute among creditors a joint fund." The action does not purport to have been brought on behalf of all the contract holders; there is no demand for an accounting for the common benefit of all contract holders or for the benefit of plaintiff; there are no appropriate averments for any relief, so far as we can discover by the complaint, except for the appointment of a receiver. True, the prayer asks for judgment for a certain sum, but the only averment looking toward a money judgment is the averment that defendant has received this amount upon the contracts mentioned, to the benefit of plaintiff, which, in itself, is not sufficient in an action for money had and received; there is no allegation of nonpayment of the money paid to the corporation. (*Hurley v. Ryan*, 119 Cal. 71, [51 Pac. 20]; *Dodge v. Kimple*, 121 Cal. 580, [54 Pac. 94].) It is not possible to make anything out of the complaint except a recital of facts, all of them substantially upon information and belief or on belief alone, as ground for the appointment of a receiver.

It may be regarded as the settled law in this state that a court of equity has no inherent power to appoint a receiver of an insolvent corporation merely because of its insolvency, or to wind up its affairs, in the absence of a statutory provision. (*Murray v. Superior Court*, 129 Cal. 628, [62 Pac. 191].) Section 564, subdivision 5, Code of Civil Procedure, provides that "a receiver may be appointed . . . in the cases when a corporation . . . is insolvent." In the *French Bank Case*, 53 Cal. 495, 553, the court said: "There is, of course, no such thing as an action brought distinctively for the mere appointment of a receiver—such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the court to make the appointment necessarily presupposes that an action is pending before it, instituted by some one authorized by law to commence it. But there is no statute of this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver." This construc-

tion of the subdivision was followed and approved in *Fischer v. Superior Court*, 110 Cal. 129, [42 Pac. 561]. It was there said: "The general rule, no doubt, is that so harsh a measure as the appointment of a receiver to take property out of one's possession without a trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice; and even in such an extreme case, a temporary injunction would usually be sufficient."

Mr. Beach, in his work on Receivers, section 141, says: "A motion to appoint a receiver will not be entertained unless notice has been given to the defendant, if practicable, and the appointment will not be made without notice, save in the case of irreparable injury." (See *Havemeyer v. Superior Court*, 84 Cal. 327, [18 Am. St. Rep. 192, 24 Pac. 121].)

Respondent claims that *Fischer v. Superior Court*, *supra*, turned on the point that a bond was not required before making the order. In this respondent is in error. The decision deals particularly with the fact that the order appointing the receiver was without notice to the adverse party, while also showing that the court was without authority to make the order to take possession of the property of the corporation, as held in the *French Bank Case*, *supra*.

We do not find it necessary to pass definitely upon the nature of these contracts. Both parties seem to regard them as illegal, and for this reason appellant contends that the law leaves plaintiff where it finds him (*Wyman v. Moore*, 103 Cal. 213, [37 Pac. 230]); and that a contract against public policy may not be made the foundation of any action, either at law or in equity. (*Chateau v. Singla*, 114 Cal. 91, [55 Am. St. Rep. 63, 45 Pac. 1015].) A very slight examination of the contract shows that there can never accumulate in the redemption fund the amount required before the company can be called upon, under the terms of the contract, to furnish the merchandise referred to. Apparently each contract stands on its own feet and the holder has no claim upon the redemption fund except to such money as he himself pays in. There appears to be no provision that forfeitures shall inure to the benefit of the redemption fund, but apparently they go to the benefit of the company. The holder has

a fully paid-up contract when he has paid \$50, but of this amount only \$29.75 goes to this redemption fund. The contract expressly provides that the merchandise will not be delivered until there is paid into that fund the full sum of \$100, so that the holder must pay into that fund \$70.25 additional, or in all \$120.25, for the privilege of receiving \$100 worth of merchandise at retail prices. A more perfect scheme of "heads I win and tails you lose" cannot well be conceived. Any person of ordinary understanding can see this by a moment's examination of the contract itself. It may be doubted whether equity will ever come to the relief of a sane person who deliberately, as in this case, without fraudulent inducement or concealment or through mistake or misrepresentation, becomes a party to such a contract. However this may be, we are convinced that the appointment of the receiver was without authority of law for the reasons hereinbefore stated. The order also contains a restraining clause, but no appeal is taken from that part of the order, if indeed it was intended to operate as an injunction or has been so treated.

So much of the order as appointed a receiver is reversed.

Hart, J., and Burnett, J., concurred.

[Crim. No. 41. Third Appellate District.—February 26, 1907.]

In re CHARLES NARVAEZ, on Habeas Corpus.

HABEAS CORPUS—TWO COMMITMENTS FROM JUSTICE COURT—SINGLE CHARGE OF PETIT LARCENY—VOID CUMULATIVE COMMITMENT—PRESUMPTIONS NOT INDULGED.—Where two cumulative commitments of six months each on two judgments were made in the justice's court on what appears to be but one charge of petit larceny, there being nothing in the record to show the contrary, no presumption can be indulged in favor of the regularity of the proceedings in the justice's court, and it cannot be presumed that there were two complaints identical in their averments, but constituting two distinct crimes, to support the second commitment. It must be deemed void; and at the expiration of the first sentence of six months, the defendant is entitled to be discharged on *habeas corpus*.

HEARING on writ of *habeas corpus* to test the validity of cumulative commitments from the justice's court for Montezuma Township, in Solano County. A. W. McDonald, Justice of the Peace.

The facts are stated in the opinion of the court.

Paul C. Harlan, for Petitioner.

J. M. Raines, District Attorney, for Respondent.

CHIPMAN, P. J.—It appears from the uncontroverted facts set forth in the petition that petitioner was, on September 19, 1906, arraigned in the justice's court of Montezuma township, Solano county, on the charge of petit larceny, for the theft of two sacks of barley; he pleaded guilty thereto and was sentenced to imprisonment in the county jail for the period of one hundred and eighty days; that he was delivered to the sheriff of said county on said day and has been ever since said day, continuously and is now, confined in said county jail, by virtue of two judgments or commitments, and not otherwise, copies of which are attached to the petition and made part thereof; that the board of supervisors of said county duly and regularly allowed petitioner thirty days' credit upon his aforesaid term of imprisonment.

It appears that the two judgments or commitments are identical and describe the same offense, the only difference being that the closing paragraph of one reads as follows: "To take effect upon the expiration of the judgment previously rendered upon the above-mentioned date in an action entitled as above." The petition was filed on February 20, 1907, and the hearing was on February 23, 1907.

It will thus appear that petitioner has already served the full period of imprisonment for which the justice of the peace had jurisdiction to commit the prisoner for a single charge of petit larceny, which is six months. (Pen. Code, secs. 490, 1205.) The two commitments show that they related to but one charge, namely, the stealing of two sacks of barley; no other construction can fairly be put upon them. If there was another charge or another complaint to which the second commitment could, or was intended to, apply, it has not been made to so appear.

It is not material which one of the commitments is taken as justification for the imprisonment; whichever one it may be, the petitioner has served the full period for which he can be held upon the conviction of a single charge of petit larceny. During the maximum time for which he was legally committed he would not be entitled to his discharge, but he cannot be held to suffer a punishment for a period in excess of that within the power of the justice to impose. (*Ex parte Bulger*, 60 Cal. 438.) There must not only be jurisdiction of the person and the subject matter, but there must be jurisdiction to impose the sentence which is adjudged. Without such jurisdiction the sentence is not merely voidable, but is void.

It cannot be presumed that there were two complaints identical in their averments but embracing two separate and distinct crimes in order to discover support for a second commitment.

No presumptions will be indulged as to the regularity of the proceedings in a justice's court. (*Ex parte Kearney*, 55 Cal. 212.)

Apparently the petitioner is being imprisoned without lawful authority.

The prisoner is discharged from custody.

Burnett, J., and Hart, J., concurred.

[Civ. No. 173. First Appellate District.—February 27, 1907.]

NORTHWESTERN PACKING COMPANY, Respondent,
v. ARTHUR L. WHITNEY et al., Appellants.

CORPORATIONS—DISPOSITION OF PROPERTY—AUTHORITY OF DIRECTORS—

POWER OF PRESIDENT.—A corporation can only act in relation to the control and disposition of its property through its board of directors, or some one authorized by the board. Its president has no power, merely by virtue of his office, to buy or sell the property of the corporation or to make an executory contract to sell its property binding upon it.

ID.—UNAUTHORIZED EXECUTORY CONTRACT OF SALE—CORPORATION NOT ESTOPPED.—The corporation is not estopped to deny the validity of

an unauthorized executory contract of its president to sell its property, to which the corporate seal is not attached, and from which it has derived no benefit and which was not authorized by any course of business between the parties nor ratified by the board of directors.

ID.—EVIDENCE—BY-LAWS OF CORPORATION.—Where a corporation is sought to be charged for breach of an agreement executed by its president which has not been performed, and there is no question of estoppel or ratification, the by-laws of the corporation are admissible in evidence to show that the president was only authorized to execute instruments in writing which have been first approved by the board of directors.

ID.—BROKER'S COMMISSION NOT ALLOWABLE—PROCURING OF PURCHASERS WHO DO NOT CONTRACT.—A broker's commission upon the unauthorized contract of sale made by the president of the corporation is not chargeable against the corporation nor is it allowable under the terms of the contract made by the president by reason of the mere finding of purchasers ready, able and willing to purchase, where there was no agreement to purchase and no sale was negotiated.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Myrick & Deering, for Appellants.

H. W. Hutton, for Respondent.

COOPER, P. J.—The complaint alleges that in October, 1902, plaintiff sold and delivered to defendants two hundred and fifty barrels of red Alaska Salt Salmon at \$7.50 per barrel, less a discount of five per cent, making the total amount due \$1,781.25; that the same had not been paid, except the sum of \$850 on account, leaving \$931.25 due and unpaid. The answer denies specifically the allegations of the complaint, and by way of counterclaim alleges that the plaintiff is indebted to the defendants in the sum of \$1,593.75 for work and labor performed by defendants for plaintiff at its special instance and request, no part of which has been paid except the sum of \$931.25, and concludes with a prayer for judgment against plaintiff in the sum of \$662.50.

The court found that the allegations of the complaint are true, and as to the answer it found: "It is not true that within the two years prior to the filing of defendants' answer herein, or at any other time, the defendants performed work and labor or either thereof for plaintiff at the plaintiff's special instance and request or otherwise, or for which the said plaintiff promised and agreed to pay the said defendants the sum of one thousand five hundred and ninety-three dollars and seventy-five cents (\$1,593.75) or any other sum of money." Upon the findings judgment was entered for plaintiff as prayed for in its complaint.

Defendants prosecute this appeal from the judgment, and urge certain rulings as prejudicial. There is no question as to the sufficiency of the evidence to support the findings, and there seems to be no serious question as to the sale of two hundred and fifty barrels of the salmon to defendants, the price agreed to be paid, and the balance due upon that transaction. The rulings complained of relate to the defendants' counterclaim. Their counterclaim is based upon what is claimed to be a contract binding upon plaintiff for the sale of all the salmon packed by the plaintiff for the season of 1902. This alleged contract is contained in a letter of which the following is a copy:

"Arthur L. Whitney.

"Albion H. Whitney.

"C. E. Whitney & Co.

"Commission Merchants,

"904 Hayward Building.

"San Francisco, Cal., April 15th, 1902.

"C. E. Whitney & Co.,

"904 Hayward Building, City.

"Gentlemen:

"Confirming verbal understanding with you, I will give you the handling of all the salted salmon packed by the Northwestern Co. and other companies in which I may be interested this year, relying on your discretion and judgment to realize the best prices possible. You to receive a commission of 5 per cent net on the sales.

"Yours truly,

"NORTHWESTERN PACKING CO.

"L. A. PEDERSEN."

It is admitted that defendants did not sell the plaintiff's salmon pack for the year referred to, but that plaintiff sold its entire pack of four thousand three hundred barrels, save and except the two hundred and fifty barrels, the subject of the complaint in this action. Defendants' contention is that the letter signed by Pedersen is a contract binding upon plaintiff corporation, and that they should have been permitted to prove that they had or procured purchasers ready, able and willing to purchase the entire pack of salmon, and thus earned the commission of five per cent as provided in said letter. The main contention is as to whether or not the letter constitutes a binding executory contract upon plaintiff corporation. Aside from the question as to the letter being unilateral and no valid consideration on the part of the defendants, we are of the opinion that the letter does not of itself constitute a valid contract binding upon the plaintiff corporation. It is written by the president of the corporation, and in it he says: "I will give you the handling of all salted salmon packed by the Northwestern Co. and other companies in which I may be interested this year." It is not attested by the seal of the corporation. There does not appear to have been any resolution of the board of directors authorizing the contract.

The salmon pack of 1902 was the property of the plaintiff, an artificial being created under the provisions of the statute. The title was in the corporation and not in Pedersen. The corporation could only act—could only speak—through the medium prescribed by law—the board of directors. The statute under which the corporation was created contains the express mandate: "The corporate powers, business and property of all corporations formed under this title must be exercised, conducted and controlled by a board of not less than three directors." (Civ. Code, sec. 305.)

The rule has been adhered to by the courts. (*Gashwiler v. Willis*, 33 Cal. 11, [91 Am. Dec. 607]; *Alta Silver Min. Co. v. Mining Co.*, 78 Cal. 629, [21 Pac. 373]; *Fontana v. Pacific Can. Co.*, 129 Cal. 51, [61 Pac. 580].) The president of a corporation has no authority by virtue of his office to buy or sell the property of the corporation, or to make an executory contract binding upon the corporation. (*Bliss v. Kaweah C. & I. Co.*, 65 Cal. 502, [4 Pac. 507].) The doctrine of *estoppel* does not apply, because the corporation has not availed

itself of any benefit in any way or manner by reason of the alleged contract. (*Id.*) Nor was the contract authorized by the course of business between the plaintiff and defendants, for the reason that it does not appear that they had ever had any business dealings with each other prior to the time the letter was written by Pedersen; nor was there ever a ratification of the alleged contract by the board of directors. If the defendants had in fact sold the salmon referred to in the letter, and the plaintiff had availed itself of the services of the defendants in making such sale, and had delivered the salmon to the purchaser or purchasers procured by defendants, then an entirely different question would be presented. In such case the plaintiff would not be allowed to reap the benefits of the contract and at the same time escape the burdens. In the case at bar it is sought to charge the plaintiff under a contract which it never made, and from which it has never received any benefit, and to compel it to pay defendants a commission for a sale they did not make and which they never agreed to make.

The court, under defendants' objection, allowed the plaintiff to read in evidence article VII of plaintiff's by-laws, which provides that the president shall sign as president "all certificates of stock and all contracts and other instruments in writing, which have been first approved by the board of directors." The defendants now urge that the ruling was erroneous, because they were strangers to and had no notice of the by-laws introduced in evidence. The record does not disclose that any such ground was stated in the objection. The objection was "to their introducing in evidence their own by-laws as a part of their own case as against us." However, the ruling was not erroneous under the circumstances of this case. As has before been stated, there is nothing to show that the plaintiff has been guilty of such conduct as to estop it from denying the validity of the contract signed by Pedersen. Where a corporation is sought to be charged for a breach of an agreement which has not been performed, and there is no question as to estoppel or ratification, the by-laws of the corporation are admissible in evidence for the purpose of showing that the contract was not executed as the by-laws provide.

It is claimed that the court erred in sustaining plaintiff's objections to certain questions asked of the defendant Arthur

L. Whitney for the purpose of showing that he had procured purchasers for the salmon who were ready, able and willing to purchase. If we are correct in our conclusion that the contract made by Pedersen was not the contract of plaintiff, then the evidence was properly excluded. The questions were each objected to as calling for the opinion of the witness, and the objections might well have been sustained on that ground. Each of the questions contained the interrogation as to whether the witness "had purchasers ready, willing and able to buy the salmon." Whether a purchaser was ready to purchase, able to purchase, and willing to purchase, would depend upon facts. If the party making an offer was able to purchase, and the price was agreed upon, the plaintiff must have been informed of the facts. Plaintiff could not have disproved the statement of the witness by independent evidence if he only said that he had a purchaser ready, willing and able to purchase. And furthermore the defendants would not have earned their commission by simply finding a purchaser who was ready, able and willing to purchase. A person might be ready, able and willing to purchase, and yet make no agreement to purchase. The broker is not entitled to a commission until he negotiates a sale by bringing the buyer and seller together. The broker does not earn his commission until he procures a valid contract to purchase, or brings the buyer and seller to an agreement. (*Gunn v. Bank of California*, 99 Cal. 349, [33 Pac. 1105].) It appears from the testimony of Arthur L. Whitney that defendant did not negotiate a sale. He testified: "I had a conversation with Mr. Webster during this time; he said that they needed the money; he was quite anxious to sell, that they had been offered \$6.75 for the salmon, and I told him that was too low; and he said that they needed the money, and I said I would advance them five dollars a barrel on it. I said, 'That is too low, and I want to get something like what the goods are worth,' and I said I would guarantee to get him at least \$7 net for the salmon. I remember that I said to Mr. Webster, if they insisted upon selling at those prices, that I would sell and could sell to better advantage to the party who eventually bought the salmon than they could, and let me do it, and he said he would. The first that I knew that the pack had been sold by the plaintiff company was shortly after that I heard it rumored that it had been,

and I called up Webster and he said yes, that it had been sold. It was not done with my knowledge or consent." He further testified as to a conversation with Webster, plaintiff's bookkeeper, as to the sale of the two hundred and fifty barrels, the subject of this case. His language is: "Mr. Webster told me one day that they were offered \$6.75, and seemed to think we ought to sell; and I told him that that was too cheap, that we could get more money, and finally he said, 'Well, I cannot afford to take any chances,' and I said, 'Well, I will guarantee you \$7 net for your salmon, but you hold on and do as you agreed with me, and I will get you more.' Well, he said they would, and shortly after that I heard, directly or indirectly, I don't know which, that they had sold their fish to a party who had been trying to buy it from me, and I called him up on the 'phone, and asked him if that was true, and he said yes, and I said, 'I have got some orders left with me that I must fill, and I want you to deliver them,' and they delivered this 250 barrels in that way, and they were sold in that way at \$7.50, less 5 per cent commission." It thus appears that the two hundred and fifty barrels were sold to defendants to fill the orders they had, and they were given credit for the five per cent commission.

The judgment is affirmed.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 295. Second Appellate District.—February 27, 1907.]

M. V. NEVES, Respondent, v. M. P. COSTA, Appellant.

ACTION FOR FALSE IMPRISONMENT—ARREST IN CIVIL ACTION—INSUFFICIENT AFFIDAVIT—ORDER WITHOUT JURISDICTION.—An action will lie to recover damages for false imprisonment under an order of arrest in a civil action where the affidavit upon which the order of arrest was based is insufficient on its face to give the superior court jurisdiction to issue the order.

1D.—ESSENTIALS OF AFFIDAVIT—COMPETENT EVIDENCE—FINDING UPON TRIAL—HEARSAY.—To justify an order of arrest under section 481 of the Code of Civil Procedure, competent evidence must appear

by affidavit of the plaintiff, or some other person, such as to justify the court in making a finding upon a trial that the case is one mentioned in section 479 of that code. If plaintiff does not personally know the facts, he must procure the affidavit of one who does personally know them. The order of arrest cannot be based upon hearsay, nor upon any statement, however positive, which is founded upon hearsay.

ID.—“FALSE IMPRISONMENT” DISTINGUISHED FROM “MALICIOUS PROSECUTION.”—The actions of “false imprisonment,” and “malicious prosecution” are quite distinct. The element of malice in the former, which is essential in the latter, can only be considered where exemplary damages are asked in the former, and then only as affecting the measure of damages; and “the want of probable cause,” which is essential in the latter, is immaterial in the former; while the necessity of awaiting the termination of the action in the latter is not required in the former.

ID.—SUFFICIENCY OF COMPLAINT—WAIVER OF UNCERTAINTY—ABSENCE OF PROBABLE CAUSE—SURPLUSAGE.—Where the complaint for false imprisonment was sufficient upon general demurrer and no special demurrer was interposed for uncertainty, all mere uncertainty is waived. Averments that the defendant acted “unlawfully and without probable cause,” if unnecessary, may be treated as surplusage and meaningless.

ID.—IMPRISONMENT AFTER SURRENDER BY BAIL—VARIANCE NOT SHOWN. The fact that the imprisonment of the plaintiff did not immediately follow the arrest makes it none the less the result of the arrest by the defendant’s procurement; and the fact that he was admitted to bail, and that the bail surrendered him into custody, without his procurement, only goes to the amount of the damages suffered, and does not show a variance as to the cause of the imprisonment.

ID.—EVIDENCE—RELEASE FROM IMPRISONMENT—TIME LOST FROM BUSINESS.—The fact that a person unlawfully imprisoned has been released and is no longer restrained of his liberty is material in ascertaining the time he has lost from his business by the detention.

ID.—MANNER AND REASON FOR RELEASE.—The manner of the defendant’s release need not be shown; and the reason of the court for his release in most cases would be immaterial, and in some cases perhaps prejudicial.

ID.—DISCHARGE ON HABEAS CORPUS—DAMAGES—COSTS AND ATTORNEYS’ FEES.—The fact that the plaintiff was discharged on *habeas corpus* was material to his allegation that he had been compelled to pay \$250 for costs and attorneys’ fees to secure his release, and the proceedings on *habeas corpus* were admissible for this purpose.

ID.—ORDER OF ARREST NOT PREJUDICIAL.—The introduction in evidence of the order of arrest by the defendant was not prejudicial, where

the court instructed the jury that the affidavit on which it was based was insufficient to justify it.

ID.—RECORD ON DIFFERENT HABEAS CORPUS—EXCLUSION—RECORD NOT IDENTIFIED—PRESUMPTION AGAINST ERROR.—The rejection of a record on *habeas corpus* against a different party offered by defendant, which is not identified nor brought up in the record, must be presumed not to have been erroneous.

ID.—UNPREJUDICIAL ERROR ON CROSS-EXAMINATION.—*Held*, that the disallowance of certain proper questions asked by defendant on cross-examination of the plaintiff was not such prejudicial error as to justify the reversal of a judgment otherwise properly rendered.

ID.—DAMAGES RECOVERABLE—GENERAL AND SPECIAL DAMAGES.—In an action for false imprisonment, the plaintiff may recover, as general damages, compensation for physical inconvenience, mental suffering, and humiliation of mind incident to the false arrest, and where expense for litigation in the *habeas corpus* proceedings were specially pleaded they are recoverable.

ID.—WAIVER OF UNCERTAINTY AS TO SPECIAL DAMAGES.—No special demurrer having been interposed, any objection as to want of certainty in the allegation of special damages is waived; and the court properly admitted evidence thereof, and properly instructed the jury as to the law of special damages.

ID.—PROPER RULINGS AS TO INSTRUCTIONS.—*Held*, that the instructions given for the plaintiff properly presented the law applicable to the case, and that instructions requested by the defendant, which were inapplicable to the evidence, or which were erroneous or misleading, were properly rejected.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Charles G. Lamberson, and J. L. C. Irwin, for Appellant.

H. B. McClure, for Respondent.

TAGGART, J.—This is an action to recover damages for false imprisonment. Defendant appeals from a judgment in favor of plaintiff, and from an order denying a new trial.

On April 5, 1905, defendant commenced an action against plaintiff in the superior court of Kings county upon an implied contract, and at the same time procured an order for

the arrest of plaintiff based upon subdivision 1 of section 479 of the Code of Civil Procedure. Plaintiff was arrested the next day, on this order, and about two hours after his arrest gave bail. In the meantime he had been permitted by the officer arresting him to go on his own recognizance. About nineteen days thereafter plaintiff was surrendered to the sheriff of Kings county by one of the sureties on his bail bond, J. V. Garcia, a relative of his wife. The same day the plaintiff signed the necessary papers for an application to be made to this court for a writ of *habeas corpus*. The application was granted, the writ was made returnable before Honorable W. B. Wallace, judge of the superior court for Tulare county, and on May 31, 1905, by order of the latter, plaintiff was discharged on the ground (as stated in the order) that the affidavit on which the order of arrest was based was insufficient.

Plaintiff was imprisoned in the county jail of Kings county from the time of his surrender by his bail as aforesaid until the day of hearing and his discharge on said writ of *habeas corpus*, a period of six days.

The complaint herein, filed June 8, 1905, alleges the commencement of the above-mentioned action in the superior court of Kings county, the making by defendant of the affidavit upon which said order of arrest was based (setting out the affidavit in full); that said affidavit was made "falsely, unlawfully and without probable cause"; that the order of arrest aforesaid was obtained upon said affidavit by defendant, and that plaintiff was arrested thereon, and imprisoned thereunder in the county jail of Kings county at Hanford for seven days; and that plaintiff was thereby restrained of his liberty against his will.

"That in so doing the said defendant herein acted falsely, unlawfully and without probable cause, and without any right or authority so to do, and against the will of this plaintiff."

"That said affidavit . . . was and is wholly false and untrue, which the defendant then and at all times since well knew."

"That by means of said false and unlawful imprisonment, and being confined and restrained of his liberty as aforesaid . . . plaintiff was injured in his credit, and was prevented from attending to his business during that time, and suffered mental anguish thereby and was compelled to pay

\$250 for costs and counsel fees in obtaining his discharge on writ of *habeas corpus*, to his damage in the sum of one thousand dollars."

The complaint is sufficient against the attacks made upon it by defendant under a general demurrer.

The affidavit upon which the order of arrest was based is insufficient on its face to give the superior court of Kings county jurisdiction to issue the order. An order of arrest is only authorized by section 481 of the Code of Civil Procedure, where "it *appears* to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 479. The affidavit must be either positive or upon information and belief, and when upon information and belief, it must *state the facts* upon which the information and belief are founded."

In order that it may *appear* to the judge it is necessary that the facts shall be stated by competent evidence, such as would justify the court in making a finding upon a trial. The *ex parte* form in which it is presented by affidavit is made competent by section 481. In order that a party who has not sufficient knowledge of his own to make the required showing may avail himself of this provisional remedy in a proper case, the code permits him to supplement his own affidavit with that of some one else who knows some fact or facts. Or, he may rely entirely upon the affidavit of "some other person," if the latter is prepared to state facts sufficient to comply with the statute.

"Where in a civil action the plaintiff desires, so to speak, to enforce his claim at the outset by arrest and imprisonment of the defendant, in other words, to have execution before obtaining judgment, it is not too much to ask him to present such evidence as alone would be receivable upon the trial of the action to justify an ordinary judgment for money." (*Markey v. Diamond*, 1 Misc. Rep. 97, [20 N. Y. Supp. 847]; *Ex parte Fukumoto*, 120 Cal. 316, 319, [52 Pac. 726].)

"While the affidavit may state generally the grounds of the application upon belief only, we understand the rule to be well settled that, to show the grounds of his belief, he must set forth such facts and circumstances *within his own knowledge*, as will authorize the officer who is to issue the warrant to *find* such a state of *facts* as required by the statute to au-

thorize the proceeding. And if the plaintiff is not himself personally cognizant of the facts and circumstances relied upon, he must procure the affidavit of some one who is thus personally cognizant of them. The warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay." (*Proctor v. Prout*, 17 Mich. 475.)

That portion of the affidavit which should be considered in this connection is as follows:

"That said defendant, as plaintiff is informed and believes, is about to depart from this state with intent to defraud his creditors.

"That affiant further avers and shows the following facts and circumstances in support of the above allegation: *That the defendant has converted all of his property into cash* (and at this time, as plaintiff is informed and believes, has the same in his immediate possession). *That the defendant told one M. Macedo that he intended to depart from this state. That the defendant on the 5th day of April, 1905, procured his trunk and all his wearing apparel to be brought to the City of Hanford, Kings County, and that the same is at this time, to wit, at the hour of nine o'clock p. m., April 5th, 1905, situated in the Azores Stables, a livery stable situated at the corner of Sixth and Redington streets in the City of Hanford, and that the same was brought to said place at or about the hour of seven o'clock p. m. of said 5th day of April, 1905.*

"*That affiant asked the defendant to settle with him as to the amount due to the affiant, the plaintiff herein, on said 5th day of April, 1905, and defendant refused, ever since has refused, and does now refuse to pay to affiant the amount due him; that said defendant is now in the City of Hanford; and that plaintiff is informed and believes that said defendant intends to leave the City of Hanford on the early morning train, on the morning of the 6th of April, 1905, and that said defendant intends to depart from the state as soon as possible.*"

The affidavit contains no positive allegation of fraudulent intent, and the only statement of the debtor's intention to leave the state is that he told M. Macedo so. The latter statement is positive in form only. It is hearsay, pure and simple. Standing by itself, it may relate to an intention of ten years ago long since carried out. If the affiant had heard the plaintiff tell Macedo it would have been competent evidence. Not

having so stated in his affidavit, it is to be presumed that he did not. If heard in any other way it was hearsay when presented in the affidavit of defendant.

That the debtor had "converted all his property into cash" may be an act freighted with import, or destitute of meaning according to circumstances. Affiant's belief that he still had the money in his possession is not a *fact*. That plaintiff had removed his trunk and wearing apparel to a livery-stable in a particular city at a particular time, disassociated from any other fact except the one that he had refused to pay affiant a debt which the latter claimed he owed, might signify that he had obtained employment at the livery-stable and had taken the most convenient time to move his personal belongings to that place. The affidavit seems wanting in the elements necessary to confer jurisdiction. There is neither positive averment of fraud nor positive evidence of facts from which fraud can be inferred. (*Fkumoto v. Marsh*, 130 Cal. 68, [80 Am. St. Rep. 73, 62 Pac. 303, 509].)

Defendant's second objection to the complaint is equally ill-founded; and it is one which cannot be considered on a general demurrer. However, as the same matter becomes material in the consideration of other questions of law involved in this appeal, we will consider it here.

The two actions of false imprisonment and malicious prosecution are quite distinct and different. "False imprisonment is the unlawful violation of the personal liberty of another" (Pen. Code, sec. 236), the interference with the personal liberty of the plaintiff in a way which is absolutely unlawful and without authority. Malicious prosecution is procuring the arrest or prosecution of another under lawful process, but from malicious motives and without probable cause.

The provocation, motive and good faith of the defendant in an action for false imprisonment constitute no material element in the case and can be considered only where punitive or exemplary damages are asked, and then only as affecting the measure of such damages. On the other hand, malice and want of probable cause are the gist of the action for malicious prosecution. Without allegation and proof of both, the action will fail. (12 Am. & Eng. Ency. of Law, 2d ed., p. 730.)

No one can recover damages for a legal arrest and conviction; therefore, in cases of malicious prosecution it becomes necessary to await the final determination of the action. But the same principle does not apply to an action for false imprisonment, as the form of action is based upon an illegal arrest and no matter *ex post facto* can legalize an act which was illegal at the time it was done. From this it will be seen that one of the essential elements of a complaint for malicious prosecution is that the proceeding upon which it is based has finally terminated in favor of the plaintiff, while it is equally apparent that this is not a necessary or proper allegation in an action for false imprisonment. (*Hopner v. McGowan*, 116 N. Y. 405, [22 N. E. 558]; *Josselyn v. McAllister*, 22 Mich. 300, 306.)

While the complaint at bar alleges that the defendant acted without probable cause, it nowhere alleges malice; and the words "unlawfully" and "without probable cause," if unnecessary, may be treated as "surplusage and meaningless." (*St. Clair v. San Francisco etc. Ry. Co.*, 142 Cal. 650, [76 Pac. 485].)

As above stated, ambiguity or uncertainty in a pleading cannot be considered on a general demurrer. It must be corrected by special demurrer, or motion to strike out or make certain. The latter method is peculiarly applicable to fragmentary statements material to, but not stating sufficiently, one cause of action, found in a pleading stating another cause of action.

The other objection to the complaint, that the imprisonment alleged in the complaint being different from that proven at the trial, the latter is presumed to have been found by the verdict, and therefore there are no allegations in the complaint to sustain the verdict, appears to be more properly considered as a question of variance of proof than as one of pleading.

That plaintiff's imprisonment was not immediately following his arrest on April 6th makes it none the less the result of the arrest by defendant's procurement. The purpose of the proceeding inaugurated by defendant was to secure execution against the plaintiff upon a judgment which defendant expected to obtain against him in the superior court of Kings county in the action begun at the time the order of arrest was issued. He was arrested for the purpose of being detained until that judgment was procured. That he

was able to give bail a portion of the time only operated to lessen the amount of damages he might have recovered from the defendant. The evidence does not show that plaintiff procured his bail to surrender him for the purpose of laying the foundation of an action to recover damages for false imprisonment.

The code provides for the surrender of an arrested debtor by his bail, and the written notice of Garcia, one of the sureties on the bail bond, to the sheriff of Kings county that he desired to surrender the plaintiff into custody, together with the bail bond showing that he was such surety, were properly admitted to show that plaintiff was surrendered to the sheriff by authority of law and as one of the steps in the proceeding begun by the defendant.

As above stated, it is not necessary in an action for abusing the process of law by an illegal act either to allege or prove the termination of the action. (2 Greenleaf on Evidence, sec. 452.) The fact, however, that a person unlawfully imprisoned has been released and is no longer restrained of his liberty is material in ascertaining the time he has lost from his business by his detention. The manner of his release is not a fact necessary to be shown, and the reason of the court for his release in most cases would be immaterial, and in some cases perhaps prejudicial. The decisions upholding the practice of admitting in evidence the proceedings on *habeas corpus* releasing the plaintiff from imprisonment for the purpose of showing this fact are in actions for malicious prosecutions or those in which the action is joined (or confused) with an action for false imprisonment. (*American Express Co. v. Patterson*, 73 Ind. 430; see *Commonwealth v. Cheney*, 141 Mass. 102, [55 Am. St. Rep. 448, 6 N. E. 724]; 12 Am. & Eng. Ency. of Law, p. 723.)

In the case at bar plaintiff was not prejudiced by the introduction of the order, as the only matter stated therein which could have been prejudicial in any event was that which was embodied in numerous rulings of the court in admitting testimony and expressly declared by the court in its instructions to the jury, to wit: "that the affidavit on which the order of arrest was based was insufficient."

The fact that plaintiff was discharged on *habeas corpus* was material to his allegation that he had been compelled to pay \$250 costs and attorney's fees to secure such release, and

it has been held that the proceedings on *habeas corpus* are admissible for this purpose. (*Forbes v. Hicks*, 27 Neb. 111, [42 N. W. 898].)

The record in the *habeas corpus* proceeding against J. V. Neves was not relevant and it was properly excluded. If there was anything on the face of the document which defendant asked to introduce that justified its admission in evidence, it should have been identified and brought up in the record. This not being done, we must presume it was properly rejected.

The other exceptions taken to the rulings of the trial court on the admission of evidence relate to the objections of plaintiff to defendant's questions on cross-examination of plaintiff, sustained by the court. While some of the questions relating to plaintiff's being compelled to pay the \$250 attorney's fee and costs in the *habeas corpus* proceeding should have been allowed as proper cross-examination, their disallowance was not such error as to justify this court in overturning a judgment otherwise properly rendered. The question, "What kind of money was this that you paid to Mr. McClure?" was proper cross-examination in response to plaintiff's direct testimony that he was compelled to pay \$250 attorney's fees and costs to secure his release on *habeas corpus*. From the entire record it appears that plaintiff did make payment of this sum and there was no effort to disprove it; so that this error could not have been prejudicial. The objections to the questions directed to what Garcia told the plaintiff were properly sustained, while the question: "Was it a paper that your lawyer wanted to take to Los Angeles?" is answered, in effect, later in the cross-examination of the plaintiff, if it were material.

The motion for a nonsuit was properly denied. Plaintiff established by his evidence that he was restrained of his liberty by the act of defendant, without lawful authority. He proved the special damages alleged, and the general damages would follow from the proof of the unlawful imprisonment.

Appellant's exceptions to instructions numbered 1 and 10, given by the court, are based upon objections already considered and determined adversely to his contention, to wit: The insufficiency of the affidavit here in question, and the

effect of the surrender of plaintiff by his bail. These instructions correctly declare the law on these subjects.

The seventh and eighth instructions relate to the damages that may be recovered in the action. The seventh to the general and the eighth to expenses incurred by plaintiff in *habeas corpus* proceedings to secure his release from imprisonment. Damages for physical inconvenience, mental suffering and humiliation of mind incident to a false arrest are all held to be elements of general and compensatory damages. (12 Am. & Eng. Ency. of Law, 2d ed., p. 783.) Expenses of litigation in *habeas corpus* proceedings may be recovered as damages: In some jurisdictions as a natural and direct result of the wrongful act, and in others as special damages. (12 Am. & Eng. Ency. of Law, 2d ed., p. 784.) The objection of defendant to the ambiguity of statement of these damages in the complaint comes too late as an objection to an instruction of the court where the right to object by demurrer to the complaint has been waived. The allegation in the complaint that plaintiff was compelled, "by means of said false and unlawful imprisonment," to pay \$250 for costs and counsel fees in obtaining his discharge, is sufficient to justify the court in submitting the evidence in relation thereto to the jury, and in instructing the jury as to the law concerning such special damages.

The fourth and ninth instructions correctly define "imprisonment" and the presumptions as to its lawfulness, and were proper instructions to the jury in this case. (*People v. McGrew*, 77 Cal. 570, [20 Pac. 92]; *Ah Fong v. Sternes*, 79 Cal. 30, [21 Pac. 381].)

Instructions designated 1 and 6 by defendant, and which the court refused to give at his request, are based upon the assumption that there is some evidence to show that the surrender of plaintiff by his bail was with plaintiff's connivance and not against his will. No evidence to this effect appears in the record. The case of *In re Gow*, 139 Cal. 242, [73 Pac. 145], has no application. That was an effort to secure an opinion of the supreme court upon a legal proposition by "making a case." The court very properly declined to be so used when it had business requiring its attention.

The instruction designated in appellant's brief as "Instruction 2," requested by the defendant, does not appear in the transcript in the case. Its refusal, if tendered, was not error.

"Instruction marked 3" is misleading in form and is also without the evidence in the case. There is no evidence in the record upon which either of these instructions could be predicated.

The specifications of the insufficiency of the evidence to sustain the verdict have all been considered, in effect, heretofore, except two. These relate to one matter. An issue was raised by the pleadings as to the falsity of the affidavit upon which the order of arrest was made and defendant's knowledge of its falseness when he made the affidavit.

It appearing that the superior court was without jurisdiction to make the order on account of the insufficiency of the affidavit, when it was assumed to be true, want of authority was shown, and the issue of the truthfulness of the affidavit became immaterial, if, indeed, it ever was a material issue in the case.

The evidence sustains the verdict. There being no prejudicial error shown, the judgment and order denying defendant's motion for a new trial are affirmed.

Allen, P. J., and Shaw, J., concurred.

[Crim. No. 52. Second Appellate District.—February 27, 1907.]

THE PEOPLE, Respondent, v. JOSEPH HINES, Appellant.

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—SUFFICIENCY OF INFORMATION.—An information for obtaining money under false pretenses from a person alleged to be its owner, with intent to cheat and defraud him, and with original intent to cheat and defraud another person named, is not defective, because it does not appear that he accomplished his purpose as to such other person, nor because it does not allege the purpose for which the owner paid the money to the defendant. It is sufficient that the information contains every allegation necessary to charge the defendant with the commission of the offense against the owner of the money.

Id.—FALSE PRETENSE OF OWNERSHIP OF RESTAURANT.—Where, to obtain the money, the defendant falsely represented that he owned a restaurant, and the personal property therein, which he did not own, it is immaterial what other person owned it.

ID.—PURPOSE AND MODE OF DEFRAUDING OWNER—QUESTION FOR PROOF.—

The question as to how the false pretense was calculated to defraud the owner of the money, whether by a loan of money or by a purported sale, was a matter to be shown by the evidence.

ID.—POSSESSION OF RESTAURANT BY DEFENDANT—VALUE IMMATERIAL.—

When the defendant was in charge of the restaurant when the false pretense was made, the court properly excluded evidence of its value as being immaterial, the only important question of value being that of the money obtained by the false pretense of ownership.

ID.—CONFLICT OF EVIDENCE—SUPPORT OF VERDICT.—

Where the evidence is conflicting as to whether the defendant was the owner of the restaurant, and as to whether he was authorized by the owner to sell it, the appellate court will not disturb the verdict of the jury against the defendant or the ruling of the court in denying his motion for a new trial.

ID.—FORM OF VERDICT—SURPLUSAGE—USE OF SYNONYMOUS TERMS—

FORM NOT PREJUDICIAL.—A general verdict finding "the defendant guilty as charged" is sufficient, and the words appended thereto, "and that the property obtained was of the amount of \$200," might be eliminated as surplusage; yet, where the offense charged was the obtaining of \$200 lawful money of the United States, the word "amount," used with reference thereto, is synonymous with "value"; and the form of the verdict shows no substantial error prejudicial to the rights of the defendants.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

Hugh J. Crawford, for Appellant.

U. S. Webb, Attorney General, and E. E. Selph, Deputy Attorney General, for Respondent.

SHAW, J.—The defendant was tried and convicted on an information which charged him with the crime of obtaining money by false pretenses.

Defendant interposed a demurrer to the information, which was overruled and exception duly taken to such ruling.

The objection that the name of Fred Rickert was included in the information as one of the persons whom defendant intended to cheat and defraud is fully answered by section 956 of the Penal Code. He is not charged with defrauding

Rickert, but merely that originally he intended to cheat and defraud him; and while it does not appear that he accomplished his purpose as to Rickert, his failure so to do does not affect the charge so far as Carter was concerned.

The information does not allege the purpose for which Carter paid the money to defendant, but this was unnecessary. It does sufficiently appear that he obtained the \$200 then and there belonging to Carter, and whether it was by a loan upon credit established by the false pretenses, or by a purported sale, is immaterial. As to how the false pretense was calculated to defraud Carter was a matter to be shown in evidence. (*Brown v. State* (Tex. Cr. Rep.), [22 S. W. 22]; *Thomas v. People*, 34 N. Y. 351.)

The information shows that Carter was the owner of the money alleged to have been obtained by defendant, and since defendant did not own the restaurant and personal property represented to be owned by him, it is therefore immaterial who owned it.

Counsel for defendant calls our attention to the cases of *People v. Mahoney*, 145 Cal. 104, [78 Pac. 354], and *People v. McKenna*, 81 Cal. 158, [22 Pac. 488], in support of his objection to the sufficiency of the information. But measured by the rules therein laid down, it is amply sufficient. It contains every essential allegation necessary to charge defendant with the commission of the offense and is calculated to fully acquaint him with the nature of the charge. (*People v. Millan*, 106 Cal. 320, [39 Pac. 605]; *People v. Cadot*, 138 Cal. 527, [71 Pac. 649].)

Defendant offered certain instructions, all except one of which, after modification, were given. The changes made therein were proper; indeed, counsel points out no error therein, merely contenting himself with the bare statement that the refusal to give them as requested constituted error.

It was sought to prove the value of the property in the restaurant at the time the defendant took charge of it, some eight or ten months prior to the commission of this offense, and upon objection the evidence directed to that point was by the court ruled out, and it is claimed that this ruling constituted error. The value of the property in the restaurant was not in issue, and it was immaterial what its value was at that time. The only important question as to value was the

value of that which defendant obtained by means of the acts alleged in the information.

It is urged that the evidence shows that defendant was the owner of the property, and, if not, that it shows that he was authorized by the owner thereof to sell it. The testimony upon these questions is conflicting, and, under the well-settled rule, this court will not disturb the verdict of the jury or the ruling of the court in denying the motion for a new trial. (*People v. Gonzales*, 143 Cal. 605, [77 Pac. 448]; *People v. Maroney*, 109 Cal. 279, [41 Pac. 1097].)

The verdict rendered by the jury was in the following form: "We the jury in the above-entitled action find the defendant guilty as charged, and that the property obtained was of the amount of \$200." A general verdict finding him guilty as charged would have been sufficient. (*People v. Millan*, 106 Cal. 320, [39 Pac. 605]; *People v. Tilley*, 135 Cal. 65, [67 Pac. 42].) The words, "and the property obtained was of the amount of \$200," might be eliminated as surplusage. He was found guilty as charged, and he was charged in the information with obtaining \$200 lawful money of the United States. We think, too, that where the word "amount" is used with reference to money it is synonymous with the word "value." Indeed, the value of any property is its equivalent amount in lawful money; it is the measure of all value. (*Bartley v. State*, 53 Neb. 310, [73 N. W. 744].) At all events, it does not constitute any substantial error prejudicial to the rights of the defendant. (Pen. Code, sec. 960.)

The record discloses no prejudicial error, and the judgment and order appealed from are affirmed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 137. First Appellate District.—February 23, 1907.]

**CARL SPENCER, Respondent, v. SAN FRANCISCO
BRICK COMPANY, Appellant.**

NEGLIGENCE—PUNITIVE DAMAGES.—Simple negligence, unaccompanied with oppression, fraud or malice, cannot justify an award of punitive damages for the resulting injury.

ID.—NEGLIGENT CONSTRUCTION OF BULKHEAD—BREAKAGE IN WET WEATHER—SLIGHT INJURY—EXCESSIVE DAMAGES—NEW TRIAL.—In an action for damages arising from the negligent construction of a bulkhead by defendant on his premises, which, after standing for two years, gave way in wet weather and damaged slightly the rear end of plaintiff's premises, where there is no evidence that the injury was willfully or wantonly done, or of gross negligence in the construction or use of the bulkhead, or of any oppression, fraud or malice, a verdict for punitive damages is excessive, and a new trial should be granted therefor.

ID.—NEGLECT TO REPAIR DAMAGES AFTER REQUEST—OPPRESSION NOT SHOWN.—The mere neglect of the defendant, after request, to repair the damage, which was unintentionally, though negligently, done, cannot be said to show oppression by subjection of the plaintiff to cruel and unjust hardships. The plaintiff had an immediate legal remedy for his damages, which only interfered with the use of a small part of his lot, to a trifling extent.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Fisher Ames, for Appellant.

Robert P. Troy, and Andrew Thorne, for Respondent.

HALL, J.—Plaintiff sued defendant for damages caused to his premises by the giving way of a bulkhead upon the premises of defendant, and recovered a judgment for the sum of \$600. Defendant moved for a new trial upon the grounds of excessive damages and errors of law occurring at the trial. The motion was denied, and defendant appealed from the judgment and order denying the motion for a new trial.

The action was for damages to the premises of plaintiff resulting from the giving way of a bulkhead on the premises of defendant, whereby dirt, gravel, sand, etc., fell against the fence and chicken-house of plaintiff, and injured the same, and gravel, dirt, etc., fell upon the plaintiff's premises, and timbers of the bulkhead were projected onto and over plaintiff's premises.

Plaintiff is the owner of a lot in the city and county of San Francisco twenty-five feet in width, the rear of which abuts against a lot owned by defendant, and used by it for the purpose of dumping dirt. To retain this dirt, defendant, some two years previous to the accident causing the injury complained of, built a bulkhead which, on January 15, 1901, following a spell of rainy weather, gave way. Plaintiff's lot was occupied by a dwelling-house, and the rear portion of the lot was inclosed with a board fence, and in the corner was a chicken-house nine feet square and eight feet high, built of boards, and two sides of which were formed by the rear and side fences of plaintiff. The giving way of the bulkhead, and the consequent falling of the heaped-up earth, pushed the fence and chicken-house out of position, broke some of the boards from the fence, as well as caused some of the beams and timbers of the bulkhead to project into and over the rear portion of plaintiff's lot. Plaintiff testified that the fencing affected was worth \$125, and the chicken-house \$30, while a carpenter called by the defendant testified that the fencing and chicken-house could have been restored to their original condition at a cost of \$25. There is no evidence that the dwelling-house was in any way injured. Indeed, a photograph of that portion of the premises claimed to have been injured, attached to the transcript, shows that the injury was confined to the rear portion of the lot, which was used for a chicken-yard. It is perfectly apparent from the evidence in the record that the actual damage could not have exceeded \$155, even if the chicken-house and fences had been destroyed, which they were not, but only pushed out of position and considerably damaged.

It is only upon the theory that the case was one where punitive damages may be given that the verdict and judgment can be sustained.

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of op-

pression, fraud, malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example, and by way of punishing the defendant." (Civ. Code, sec. 3294.)

Simple negligence will not justify an award of punitive damages. (*Moody v. McDonald*, 4 Cal. 297; *Sloan v. Southern Cal. Ry. Co.*, 111 Cal. 687, [44 Pac. 320].)

There is no evidence in this case that the injury was willfully or wantonly done, or that defendant was guilty of gross negligence in the construction of the bulkhead, or in the use of its lot, and there is no pretense of any fraud in the case. It was simply shown that after standing for two years the bulkhead gave way, following a spell of wet weather. From this it may be presumed that it was negligently constructed, or that too much earth was negligently heaped against it.

In the case of *Chicago Ry. Co. v. Scurr*, 59 Miss. 456, [42 Am. Rep. 373], cited with approval in *Mabb v. Stewart*, 133 Cal. 556, [65 Pac. 1085], it is said: "We are prepared to go a step further, and say that in any and all actions for damages, where the proof fails to show anything that will warrant an implication of willfulness, recklessness, or rudeness, it is the duty of the court to inform the jury, where requested so to do, that they cannot inflict punitive damages. Not to do so in a case free from doubt would be an abdication of judicial authority, and a permission to the jury to violate the settled principles of law."

In the case at bar there was no evidence of recklessness, willfulness or rudeness in the original trespass, but it is claimed on the part of the plaintiff that there is evidence of oppression in this: that after the accident had happened plaintiff requested defendant to repair the damage, and it neglected to do so. It is in evidence that immediately after the accident plaintiff notified a bookkeeper of defendant to fix up plaintiff's property, and again in May following the accident he made the same request of the secretary of the defendant, which he repeated to the president of the defendant in the following July, but nothing was done by the defendant until after the action was brought, although defendant promised to do so. Oppression is defined by the Standard Dictionary as "the act of subjecting to cruel and unjust hardships." The mere omission to repair a damage unintentionally though negligently done cannot be said to be sub-

jection to cruel and unjust hardship. Plaintiff had an immediate legal remedy for his damage in an action therefor. So far as the projecting timbers, etc., constituted a nuisance on his property he could have abated the same by his own act. They did not interfere with the use of the dwelling-house, but only interfered with the use of the rear portion of the lot to a trifling extent.

Substantially this case presents the aspect of a defendant neglecting to make reparation to a plaintiff for damage which he has negligently but unintentionally caused the plaintiff, and for which plaintiff had a legal remedy. If upon such a showing exemplary damages may be awarded, it is difficult to see why such damages may not be awarded in all cases of injuries resulting from negligence when the party in fault refuses to make good the damages on demand. The evidence does not disclose a case of fraud, malice or oppression. For this reason the damages allowed are excessive and a new trial should have been granted.

There being no evidence to justify an award of punitive damages, the court also erred in refusing the instruction requested by defendant, "That this is not a case for punitive or exemplary damages, and that the plaintiff can in no event recover more than such damages as were actually suffered by him." (*Mabb v. Stewart*, 133 Cal. 556, [65 Pac. 1085].)

Judgment and order are reversed.

Cooper, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 29, 1907.

[Civ. No. 337. First Appellate District.—February 28, 1907.]

UNION COLLECTION COMPANY, Appellant, v. RICHARD B. SNELL et al., Defendants; EDNA SNELL POULSON, Respondent.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION—RIGHTS OF THIRD PARTIES.—Upon a proceeding supplementary to execution the judgment creditor is not entitled to an order that a third person, who has received money from the judgment creditor, which is claimed in good faith to be the property of such third person, shall pay the same to the sheriff to be applied by him toward the satisfaction of the judgment. The title of such third person cannot be litigated in such proceeding.

1D.—MODES OF LITIGATING TITLE OF THIRD PERSON—POWER OF COURT—CREDITOR'S BILL.—The only power of the court in the supplementary proceeding is to authorize the judgment creditor to institute an action against such third person to recover the money and to forbid a transfer of it until such action shall be prosecuted to judgment. But the judgment creditor may also litigate the question by a creditor's bill against such third person as claiming under the judgment debtor. Such creditor's bill is not superseded by proceedings supplementary to execution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, entered on the report of a referee in proceedings supplementary to execution. John M. Eshelman, Referee. James M. Trout, Judge Appointing Referee.

The facts are stated in the opinion of the court.

J. S. Reid, Smith & Pringle, and J. A. Johnson, for Appellant.

W. G. Witter, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment entered on the report of a referee in proceedings supplementary to execution.

Many elements are absent from the record. A mere statement of the case will have to be made largely from inferences.

The appellant some time prior to these proceedings obtained a judgment against Mary E. Snell, Sarah N. Snell and Richard B. Snell; execution was issued thereon, and the same was duly returned by the sheriff unsatisfied. Thereafter proceedings supplementary to execution were instituted by the judgment creditor, in which a referee was appointed. The referee examined witnesses, considered the questions presented and reported that the order prayed for by the judgment creditor should be denied, upon which report a judgment was entered, pursuant to the report of the referee, that the judgment creditor take nothing against Mrs. Edna Snell Poulson.

The report of the referee shows that during the year 1900 Mrs. Poulson paid certain debts owing by her brother and sisters, Richard B. Snell, Sarah N. Snell and Mary E. Snell, amounting to \$3,500. These payments were made without authority, and without the knowledge or request of the brother and sisters of Mrs. Poulson, nor was there any subsequent promise on their part to repay Mrs. Poulson. On March 12, 1904, Mary E. Snell received from a certain estate \$1,900 as a legacy, \$1,600 of which, March 21, 1904, she gave to Mrs. Poulson to apply on account of payments made by Mrs. Poulson as hereinabove stated. It is contended by appellant that Mrs. Poulson was a mere volunteer (*Curtis v. Park*, 55 Cal. 105; *Moulton v. Loux*, 52 Cal. 81; *Gray v. Brunold*, 140 Cal. 620, [74 Pac. 303]); that as such there was, as between her and her brother and sisters, no valid subsisting indebtedness capable of being enforced, and that the attempted payment to her by Mary E. Snell of \$1,600 was void as to creditors.

The only order or judgment that the judgment creditor requested was that Mrs. Poulson pay the \$1,600 to the sheriff, to be applied by him toward the satisfaction of the judgment against the Snells. From the record it is plain that Mrs. Poulson in good faith claims the \$1,600 as her own. She claiming the money, her title to it cannot be litigated in this proceeding. She must have her day in court. The only power of the court in this proceeding was to authorize the judgment creditor to institute an action against her for the recovery of the money, and to forbid a transfer of it until such action could be commenced and prosecuted to judgment. (*McDowell v. Bell*, 86 Cal. 615, [25 Pac. 128].) In the

case of *Lewis v. Chamberlain*, 108 Cal. 527, [41 Pac. 413], a judgment creditor claimed that certain transfers of property were made by the judgment debtors to avoid payment of his judgment. Each of the two transferees, among other things, claimed the property transferred to her as her own. In that case it is said: "This proceeding was brought under the provisions of the Code of Civil Procedure, entitled 'Proceedings supplementary to execution.' I think it is entirely clear from the face of the statute that no order could be legally made requiring Mrs. Morse or Mrs. Conklin to surrender the property mentioned in the affidavit of the plaintiff, and its application in satisfaction of his judgment, otherwise than upon their admission that it was the property of the judgment debtor. To make such order in relation to property which they claimed to own in their own right, if it could have any effect or operation, would be to deprive them of their property upon a summary process and without due process of law. If the plaintiff believes or claims their title under the conveyances mentioned in his affidavit to be invalid, an issue as to such ownership and title should be properly made and tried in an appropriate action, in which the verdict of a jury or the findings of a court may be regularly had determining those questions, and upon which a judgment could be regularly entered by which the parties would be conclusively bound."

We do not mean to intimate that the only way in which the judgment creditor could have questioned the title of Mrs. Poulson to the \$1,600 was by proceedings supplementary to execution. Such proceedings have not superseded or abolished the right of one to bring a suit in the nature of a creditor's bill. In the case of *Rapp v. Whittier*, 113 Cal. 431, [45 Pac. 703], it is said: "The complaint being in the nature of a creditor's bill to subject property of Robbers, claimed by Whittier, to the satisfaction of plaintiff's judgment against the former, appellant contends that the action does not lie; that with us the provisions of the statute for proceedings supplementary to execution (Code Civ. Proc., secs. 717-720) totally supplant any action of this kind. Since appellant asserted title under the transfer from Robbers, and adversely to him, it would have profited plaintiffs nothing to pursue the course provided by the statute; in the face of that claim they could not, by supplemental proceedings,

reach the fund held by appellant. In such a case those proceedings do not supersede the remedy by action, for the reason that they are not adequate to accomplish the purpose of the action."

The judgment of the trial court is affirmed.

Hall, J., and Cooper, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 28, 1907.

[Civ. No. 269. First Appellate District.—March 1, 1907.]

C. P. HALL, Respondent, v. JUSTICE'S COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, and JOHN R. DANIELS, Justice of said Court, Appellants.

JUSTICES' COURTS—JUDGMENT BY DEFAULT—TIME OF ENTRY—CONSTRUCTION OF CODE—MINISTERIAL DUTY—DIRECTORY PROVISIONS—JURISDICTION.—Section 871 of the Code of Civil Procedure does not direct a justice of the peace to enter a judgment by default within any prescribed time. Section 911, subdivision 4, and section 912 of the same code, requiring the justice to enter on his docket "the time when the parties or either of them appear, or their nonappearance if default be made," and to make these entries "at the time when they occur," merely provide for ministerial duties and are directory. The failure to execute a ministerial duty in proper time does not devert the court of jurisdiction.

DO.—LENGTH OF DELAY IN ENTERING JUDGMENT—JURISDICTION NOT EXCEEDED—FAILURE TO APPEAL—WRIT OF REVIEW.—The fact that there was a delay of eight years in entering a judgment by default in the justice's court after the return of the service of summons upon the defendant does not show an excess of jurisdiction. A writ of review does not lie to annul the judgment, where jurisdiction was not exceeded in its entry, nor can the writ be granted where an appeal may be taken, or where, by the neglect of the applicant in failing to appeal, the right of appeal has been lost.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, annulling a judgment of the justice's court of said city and county. John R. Daniels, Justice of said court. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

A. P. Dessouslavy, for Appellants.

The statute as to entry of default and judgment by default in the justice's court is directory, and the delay of eight years in the entry of the judgment after service of summons and nonappearance was not in excess of jurisdiction. (Code Civ. Proc., secs. 871, 911, 912; *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366; *American Type Founders' Assn. v. Justice's Court*, 133 Cal. 319, 65 Pac. 742, 978; *McQuillan v. Donahue*, 49 Cal. 157; *Edwards v. Hellings*, 103 Cal. 204, 207, 37 Pac. 218; *Lynch v. Keely*, 41 Cal. 232; *Montgomery v. Superior Court*, 68 Cal. 407, 411, 9 Pac. 720; *Disque v. Herrington*, 139 Cal. 1, 72 Pac. 336; *Larue v. Gaskins*, 5 Cal. 507; *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685; *Thomasson v. Simmons*, 57 W. Va. 576, 50 S. E. 740; *Presley v. Dean*, 10 Idaho, 375, 79 Pac. 71; *Chamberlain v. Edmonds*, 18 App. Cas. 332, 344; *Tomlin v. Woods*, 125 Iowa, 367, 101 N. W. 135; *Southern Pacific Co. v. Russell*, 20 Or. 459, 20 Pac. 304; *Knapp v. King*, 6 Or. 246; *Wissman v. Meagher*, 115 Mo. App. 82, 91 S. W. 448; *Calvert v. Hendricks*, 155 Ind. 592, 58 N. E. 832; *Wheeler & Wilson Mfg. Co. v. Donohoe*, 49 Ark. 318, 5 S. W. 342; *Hasler v. Schopp*, 70 Mo. App. 469; *Martin v. Pifer*, 96 Ind. 245, 249; *Fish v. Emerson*, 44 N. Y. 376; *Hickey v. Hinsdale*, 8 Mich. 267, 77 Am. Dec. 450; *Saunders v. Tioga Mfg. Co.*, 27 Mich. 550.) *Certiorari* will not lie to annul a judgment from which an appeal may be taken, or after the time to appeal has elapsed. (*Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Weldon v. Superior Court*, 138 Cal. 427, 71 Pac. 502; *White v. Superior Court*, 110 Cal. 54, 42 Pac. 471; *Central Pac. Ry. Co. v. Placer County*, 43 Cal. 365; *Weill v. Light*, 98 Cal. 193, 32 Pac. 943; *McDonald v. Agnew*, 122 Cal. 448, 55 Pac. 125; *Tucker v. Justice's Court*, 120 Cal. 512, 52 Pac. 808; *McCue v. Superior Court*, 71 Cal. 545, 12 Pac. 615; *Stuttmeister v. Superior Court*, 71 Cal. 322, 12 Pac. 270; *Milliken v. Huber*, 21 Cal. 166; *Faut v. Mason*, 47 Cal. 7; *Reynolds v. Superior Court*, 64 Cal. 372, 28 Pac. 121; *Bennett v. Wallace*, 43 Cal. 25; *Valentine v. Superior Court*, 141 Cal. 615, 75 Pac. 336.) *Certiorari* will not lie where there is no appreciable injury or injustice to the applicant for the writ. (4 Ency. of Pl. & Pr. 34; 6 Cyc. 747; *Keys v. Marin County*, 42 Cal. 252; *Hagar v. Yolo County*, 47 Cal.

222; *Knapp v. Heller*, 32 Wis. 467; Spelling on Extraordinary Remedies, 2d ed., sec. 1897.)

H. V. Morehouse, and Knight & Heggerty, for Respondent.

The language of the statute is mandatory that the justices *must* enter nonappearance; if there is a default at the time of its occurrence (Code Civ. Proc., sec. 911), and if the defendant fails to appear, *then*, upon proof of the service of summons, the court *must* enter judgment. (Code Civ. Proc., sec. 871.) The judgment, if postponed, must relate back to the default, and be *nunc pro tunc*, if it could be rendered at all subsequently thereto; though where the plaintiff is guilty of laches, the court will leave him to his laches. (Black on Judgments, sec. 129.) If judgment by default had been entered at the time required by law, execution would be barred, and there would be no further remedy. (Code Civ. Proc., sec. 901; *Heinlen Co. v. Cadwell*, 3 Cal. App. 80.) The court had no jurisdiction to render a judgment after the lapse of the time at which execution could have been issued, but for the laches of the plaintiff. The jurisdiction of the justice's court is special and limited (Code Civ. Proc., sec. 925), and the court must act within and not without the statute, and nothing can be presumed in favor of its jurisdiction. (*Kane v. Desmond*, 63 Cal. 464; *Rowley v. Howard*, 23 Cal. 401; *Lour v. Alexander*, 15 Cal. 296; *Jolley v. Foltz*, 34 Cal. 321.) The laches was wholly that of the plaintiff in the action, and not of the defendant in failing to appeal from a judgment of which he had no knowledge, and on which there could be presumably no remedy in favor of the plaintiff. (*People v. Eldorado County*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court*, 59 Cal. 661; *Myrick v. Superior Court*, 68 Cal. 98, 8 Pac. 648.) There never was a remedy by appeal. There was no question of fact upon which an appeal could be taken, and no question of law could be considered, as there could be no statement of the case, upon a judgment by default. (Code Civ. Proc., sec. 975.) The court, in view of the laches of the plaintiff in the action, exceeded its jurisdiction, after the lapse of eight years, when all right of further relief was barred, in rendering a judgment for plaintiff by default; and under the facts appearing in the record, the superior court properly annulled the judgment upon *certiorari*.

KERRIGAN, J.—This is an appeal by defendants in a *certiorari* proceeding, in which the trial court gave the respondent judgment, annulling a judgment in favor of the plaintiff in the justice's court in and for the city and county of San Francisco.

On December 2, 1896, Benjamin Lust commenced an action against C. P. Hall in the justice's court in the city and county of San Francisco to recover \$253.75 for goods sold and delivered. Summons was issued on that date, and was served January 7, 1897. Summons was returned served January 28, 1897. Nothing further was done in the action until more than eight years after the return of summons, when, on May 19, 1905, judgment was entered in favor of the plaintiff and against the defendant for \$253.75, interest and costs. No appeal was ever taken from this judgment. It is the contention of respondent that it was the duty of the justice, at the time of the return of the service of summons, January 28, 1897 (it disclosing that the time within which to appear and answer had expired), to note on the docket the nonappearance of the defendant, and to thereupon enter a judgment of default in favor of the plaintiff and against the defendant. That, if he did not do so then, he might do so later, but as of the date of the default. This contention rests upon sections 845, 871, 911, and 912, Code of Civil Procedure. Section 911, Code of Civil Procedure, requires "Every justice to keep a docket in which he must enter" (subd. 3) "the date of the summons and the time of its return"; (subd. 4) "The time when the parties or either of them appear, or their nonappearance, if default be made." Under section 912, Code of Civil Procedure, these entries "must be made at the time they occur." Under section 845, Code of Civil Procedure, defendant, having been served in the city and county of San Francisco, had five days thereafter within which to appear and answer. Section 871, Code of Civil Procedure, in part is as follows:

"If the defendant fail to appear, and to answer or demur within the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had:

"1. If the action is based upon a contract, and is for the recovery of money, or damages only, the court must render judgment in favor of the plaintiff for the sum specified in the summons."

Section 871, Code of Civil Procedure, does not direct the justice to enter a judgment by default within any prescribed time. The entry of the nonappearance of the defendant, which sections 911 (subd. 4) and 912 exact, is a ministerial duty. It is made by the clerk of the justices' court in the city of San Francisco. (Code Civ. Proc., sec. 93.) The failure to execute a ministerial duty does not divest a court of jurisdiction. Provisions of the code much stronger and definite in terms than the sections cited have been repeatedly held directory. In the case of *Heinlen Co. v. Phillips*, 88 Cal. 557, [26 Pac. 366], a justice had made an order setting aside a judgment rendered by him after trial on the ground that it was void under section 892, Code of Civil Procedure, having been rendered six weeks after the case had been submitted. Section 892, Code of Civil Procedure, is as follows: "When the trial is by the court, a judgment must be rendered at the close of the trial." The court, at page 559 of 88 Cal. [page 367 of 26 Pac.], said: "It is to be observed that no penalty is prescribed or consequence attached to a violation of this section. And we think that if the legislature had intended that the delay of a day by the justice (for that would be a violation of the provision) should subject the parties to the expense of a retrial, it would have said so in express terms. A similar but much stronger provision was enacted in relation to the district courts, and it was held to be merely directory. (*McQuillan v. Donahue*, 49 Cal. 157.) It is true that the superior court is a court of general jurisdiction, while the justice's court is one of limited jurisdiction. But the decision did not proceed upon the power of the court, but upon the intention of the legislature."

That case was followed and approved in *American Typefounders' Co. v. Justice's Court of Sausalito Township*, 133 Cal. 319, [65 Pac. 742, 978].

In the case of *Edwards v. Hellings*, 103 Cal. 205, [37 Pac. 218], the default of the defendants was ordered by the superior court entered March 14, 1884, but judgment was not entered against him until January, 1892, nearly eight years later. In that case it is said, at page 207: "The provision [referring to Code Civ. Proc., sec. 585] that the clerk must enter the judgment 'immediately' after entering his default is merely directory. His failure to do so may render him liable to an action by the judgment creditor, but does not

render void the judgment subsequently entered upon such default, nor can the defendant against whom the judgment is entered invoke such failure for the purpose of annulling a judgment to which he has no other defense. The statute of limitations upon the judgment runs from the time of its entry, and not from its rendition. (*Trenouth v. Farrington*, 54 Cal. 273. See, also, *Franklin v. Merida*, 50 Cal. 289.) If the appellant had desired to set the statute of limitations running he could himself have caused the judgment to be entered at any time after its rendition."

In the case of *Lynch v. Kelly*, 41 Cal. 232, it was held that notwithstanding that section 594 of the Practice Act provided that upon the receipt of any verdict the justice should "immediately render judgment accordingly," that "the formal entry of the judgment" was a mere clerical duty imposed upon him by statute. That case was approved in *Montgomery v. Superior Court*, 68 Cal. 407, [9 Pac. 720]. In this connection reference may be made to *Waters v. Dumas*, 75 Cal. 563, [17 Pac. 685], where section 664, Code of Civil Procedure (providing that, after a trial by a jury, judgment must be entered by the clerk within twenty-four hours after the rendition of the verdict) is held to be directory; and to *Rosenthal v. McMann*, 93 Cal. 505, [29 Pac. 121], in which section 581, Code of Civil Procedure, subdivision 6 (providing that an action may be dismissed by the court when, after verdict or final submission, the party entitled to judgment neglects to demand and to have the same entered for more than six months), is held not to be mandatory. (See, also, *Disque v. Herrington*, 139 Cal. 1, [72 Pac. 336]; *Larue v. Gaskins*, 5 Cal. 507.)

"A writ of review may be granted . . . when an inferior tribunal . . . exercising judicial functions has exceeded the jurisdiction of such tribunal . . . and there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy." (Code Civ. Proc., sec. 1068.) Tested by this section and the decisions in this state, the writ should not have been granted. The justice's court acted within its jurisdiction, as has just been shown. Again from the judgment in the justice's court defendant had an appeal, which he lost through his own laches; and again, according to the petition itself for the writ of *certiorari*, the defendant knew of the rendition of the judgment against him within thirty days

thereafter, and therefore within time to have moved in the justice's court, under section 859, Code of Civil Procedure, as amended in 1905, to set aside the judgment if taken against him by his mistake, inadvertence, surprise or excusable neglect.

The justice's court having acted within its jurisdiction, *certiorari* will not lie.

In *Borchard v. Supervisors*, 144 Cal. 14, [77 Pac. 708], it is said: "It is too well settled to require the citation of authorities that the writ of review runs to inferior tribunals, boards, or officers exercising judicial functions solely to correct errors in excess of jurisdiction, or, in other words, to confine such tribunals and officers, exercising judicial functions, to their proper jurisdiction"; citing *Farmers' & Merchants' Bank v. Board of Equalization*, 97 Cal. 318, [32 Pac. 312]; *White v. Superior Court*, 110 Cal. 60, [42 Pac. 480]; *Quinchard v. Trustees of Alameda*, 113 Cal. 664, [45 Pac. 856].

An appeal might have been taken, and it is no excuse that defendant did not know of the rendering of the judgment in time to avail himself of that remedy. In the case of *Tucker v. Justice's Court*, 120 Cal. 512, [52 Pac. 808], the court said: "And it is well settled that when an appeal may be taken, resort cannot be had to a writ of review. The cases so holding are numerous, and need not be cited." (See, also, *Weldon v. Superior Court*, 138 Cal. 429, [71 Pac. 502].) It is also well settled that where the remedy by appeal has once existed, *certiorari* will not be granted, because the time for appeal has passed. (*McCue v. Superior Court*, 71 Cal. 545, [12 Pac. 615]; *Stuttmeister v. Superior Court*, 71 Cal. 322, [12 Pac. 270]; *Milliken v. Huber*, 21 Cal. 166; *Faut v. Mason*, 47 Cal. 7; *Reynolds v. Superior Court*, 64 Cal. 372, [28 Pac. 121].) And it is equally well settled that *certiorari* cannot be used as a substitute for an appeal after the opportunity to appeal has been lost by the neglect or laches of the applicant. In *Bennett v. Wallace*, 43 Cal. 25, it is said: "The statute was intended to supply a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself." To the same point see, also, *Faut v. Mason*, 47 Cal. 7; *Valentine v. Police Court*, 141 Cal. 615, [75 Pac. 336].

The judgment is reversed, and the trial court directed to dismiss the petition.

Hall, J., and Cooper, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 29, 1907.

[Civ. No. 810. First Appellate District.—March 4, 1907.]

L. C. MARSHUTZ, Respondent, v. EDWARD SELTZOR
et al., Defendants; JOHN G. KLUMPKE, Appellant.

QUIETING TITLE—OUTLAWED MORTGAGE BY THIRD PARTY—RULE AS TO PAYMENT INAPPLICABLE—BURDEN OF PROOF—FINDINGS.—The rule that a mortgagor or his successor, with notice of the mortgage, cannot quiet title against the mortgagee, though the debt is outlawed, without first paying the debt, is inapplicable, where the mortgage is by a third party, and the defendant does not sustain the burden resting upon him to allege and prove the connection of plaintiff's title therewith, and where it is alleged and found that plaintiff's title originated from the state subsequently to the mortgage, and was adverse thereto, and it is found that at the time of the commencement of the action plaintiff was the owner and seised in fee of the premises. In such case, the findings justified a decree quieting plaintiff's title against the outlawed mortgage, which is not found or shown to have ever been a lien on plaintiff's title.

ID.—CROSS-COMPLAINT TO FORECLOSE MORTGAGE—ANSWER—PLEA OF STATUTE—FINDINGS.—Where the defendant sought by cross-complaint to foreclose the outlawed mortgage, and the answer thereto pleaded that the action was barred by section 337 of the Code of Civil Procedure, a general finding that the action "was barred by the statutes of California," followed by a finding "that said claim of the defendant Klumpke under the mortgage security so assigned to him is over forty years past due, and has not been prosecuted in any way until the filing of the cross-complaint," sufficiently shows that the action on the note and mortgage was barred by the section pleaded.

ID.—AFFIRMATIVE PROCEEDING TO ENFORCE OUTLAWED DEBT.—A proceeding under a cross-complaint to foreclose a mortgage is an affirmative proceeding to collect the debt secured by the mortgage, and

where the debt is outlawed and the statute is pleaded, no decree of foreclosure should be entered, though the cross-complaint is in an action to quiet title against the mortgagee.

ID.—COMPELLING ADVERSE FINDING—REMOVAL OF CLOUD UPON TITLE.—

It seems that by setting up the outlawed mortgage by way of cross-complaint to foreclose it, the appellant having compelled a finding that the mortgage was barred, which resulted in a denial to him of any relief thereon, he has practically caused the removal of any cloud that might exist on plaintiff's title by reason of the existence of the mortgage.

ID.—UNCERTAINTY IN FINDINGS—CONSTRUCTION IN FAVOR OF JUDGMENT.—

Any uncertainty in the findings arising from a finding that the mortgagor had an interest which antedated plaintiff's title, suggesting a possible inference that plaintiff's title may have been subordinate thereto, must be so construed, in connection with the other findings, as to uphold the judgment rather than to defeat it.

ID.—CONSTRUCTION AGAINST JUSTICE.—Justice does not demand that uncertainties in findings should be so construed as to give vitality to a claim forty-five years past due, bearing interest at the rate of three per cent per month, and for which the present holder is found to have paid nothing.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

R. H. Countryman, for Appellant.

R. Masson Smith, for Respondent.

HALL, J.—Plaintiff brought this action December 6, 1901, against defendants to quiet his title to beach and water lot No. 763, situate in the city and county of San Francisco. The complaint is in the usual form and alleges that plaintiff is the owner and seised in fee of the described premises, and that defendants claim some estate or interest therein. Defendant Klumpke answered, and besides denying the title of plaintiff set up by way of answer and as a defense that on the first day of April, 1854, James C. Cary was the owner of an undivided one-half interest in the said lot, and on said day executed to one Edward F. Seltzor a mortgage of his interest in said lot to secure the payment of his promissory note to said Seltzor

for \$2,000, payable eight months after date thereof (April 1, 1854), with interest at three per cent per month. Mortgage was duly recorded April 3, 1854, and no part of the principal and interest has ever been paid. The note and mortgage are alleged to have been assigned to defendant Klumpke by Seltzor for value February 4, 1859, and the assignment duly recorded on same day.

Defendant Klumpke, in a cross-complaint, set up the same matters, and prayed, in the usual form, that his said mortgage be foreclosed.

Plaintiff answered Klumpke's cross-complaint, and, among other things, pleaded that said cause of action was barred by the statute of the state of California, "and particularly by section 337 of the Code of Civil Procedure, and also by sections 319 and 343 of said Code of Civil Procedure."

The court, at the conclusion of the trial, made findings, and entered a judgment quieting plaintiff's title as against Klumpke, and denied Klumpke any relief upon his cross-complaint, having found the note and mortgage were barred by the statute of limitations.

Defendant moved for a new trial, which being denied, he appealed from the order as well as from the judgment.

Appellant insists that the court should have directed a foreclosure of his mortgage, and in any event should not have quieted plaintiff's title as against appellant.

First, as to the foreclosure of the mortgage, appellant urges that the plea of the statute is defective, and that the findings thereon are insufficient. In this he is mistaken. The answer to the cross-complaint distinctly alleges that the cause of action is barred by the provisions of section 337 of the Code of Civil Procedure, which is the appropriate section to plead. The court found that the promissory note mentioned in the cross-complaint is and was "barred by the Statutes of the State of California," but did not specify by what section of the code, and counsel now insist that this is not sufficient. But in addition to the general finding the court also found "that said claim of the defendant Klumpke, under the mortgage security so assigned to him, is over forty years past due, and has not been prosecuted in any way until the time of the filing of said cross-complaint." This is such a finding of fact as necessarily shows that the action on the note and mortgage was barred by the section pleaded.

Further, it may be observed that the cross-complaint on its face shows the action herein set forth to be barred, and plaintiff might have raised the point by demurrer. By pleading the bar in his answer to the cross-complaint plaintiff gave notice of his intention to stand upon the bar that was shown to exist upon the face of appellant's pleading, and it is at least doubtful whether or not the court was required in such a case to make a finding of the fact. There was no issue as to the existence of the fact.

Appellant's main contention, however, is that the court should have ordered the mortgage foreclosed, notwithstanding that it was long since barred by the statute. In this connection appellant concedes that he could not have enforced his claim if he had brought the action to foreclose, as plaintiff, but insists that where a plaintiff brings an action to quiet his title against a mortgage, the mortgagee may obtain a decree of foreclosure on an outlawed mortgage. It is true that a mortgagor, or the successor in interest of such mortgagor with notice of the mortgage, cannot obtain a decree quieting his title against the mortgagee, without paying the unpaid but outlawed mortgage debt (*Grant v. Burr*, 54 Cal. 298; *De Cazara v. Orena*, 80 Cal. 132, [22 Pac. 74]; *Brandt v. Thompson*, 91 Cal. 458, [27 Pac. 763]; *Boyce v. Fisk*, 110 Cal. 107, [42 Pac. 473]; *Hall v. Arnott*, 80 Cal. 348, [22 Pac. 200]; *Spect v. Spect*, 88 Cal. 437, [22 Am. St. Rep. 314, 26 Pac. 203]; *Booth v. Hoskins*, 75 Cal. 271, [17 Pac. 225]); but it does not follow from this that the defendant mortgagee can, upon a cross-complaint, setting up such outlawed mortgage, obtain affirmative relief. This question was presented in *Booth v. Hoskins*, 75 Cal. 271, [17 Pac. 225]. Booth sued Hoskins to quiet his title; and Hoskins answered, and by way of cross-complaint set up a deed from Booth to Hoskins, and claimed title thereunder. Plaintiff answered the cross-complaint, and set up that the deed was intended as a mortgage to secure the payment of \$408 loaned to plaintiff, and that the debt thus created was before the commencement of the action barred by the statute of limitations. The trial court entered a decree foreclosing the mortgage, which was on appeal reversed. After deciding that the deed was intended as a mortgage, the court said: "The next question is, Was the defendant's cause of action to recover back his money barred by the statute of limitations? We think it was. . . . The defendant's right to

recover the money due him being barred, he was not entitled to have his mortgage foreclosed." The judgment of foreclosure was reversed.

In *Spect v. Spect*, 88 Cal. 437, [22 Am. St. Rep. 314, 26 Pac. 203], it is said: "The mortgagee, after the mortgage debt has been barred by the statute of limitations, cannot, by any affirmative proceedings on his part, invoke the aid of the court for the collection of his debt."

A proceeding under a cross-complaint to foreclose a mortgage is an affirmative proceeding to collect the debt secured by the mortgage.

This disposes of the contention that the court should have entered a decree upon the findings for a foreclosure of the mortgage. No such decree should have been entered. (*Booth v. Hoskins*, 75 Cal. 271, [17 Pac. 225].)

It is next urged that on the findings the court should not have rendered a decree quieting plaintiff's title against appellant, but should either have denied plaintiff any relief, or provided in the decree that his title be quieted only on his paying, within some designated time, the amount unpaid on the mortgage. It might be suggested in this connection that, inasmuch as by setting up the mortgage by way of cross-complaint and asking for a foreclosure, appellant compelled a finding that his mortgage was barred, which resulted in a denial to him of any relief thereon, he has practically caused the removal of any cloud that might exist on plaintiff's title by reason of the existence of such mortgage. The finding that the mortgage is barred, and the denial of any affirmative relief thereon, would seem to be an effectual bar to any future action to enforce the mortgage.

However, we do not think that it is true that the findings in this case do not support the judgment as rendered. The law undoubtedly is that a mortgagor or his successor in interest, with notice of the mortgage, cannot quiet his title against the owner of the outstanding mortgage, even though the mortgage be barred, without paying the mortgage debt. All the cases cited to us are of that nature. But the findings in this case do not bring it within this rule. It is not alleged in the answer that plaintiff, or any grantor of plaintiff, made the mortgage set up by Klumpke. The mortgage was made by one Cary, and no attempt is made in the answer to connect the plaintiff with Cary. While it is alleged and found that

Cary owned an interest in the lot in 1854 when he executed the mortgage, it is not alleged that plaintiff's title was acquired from Cary or was derived from him in any way. The findings, on the contrary, show that plaintiff obtained title in 1883, deraigned by mesne conveyances from the land commissioners of the state of California, and that he entered into possession under such title, and for eighteen years past has been in the actual possession of the premises, holding the same adverse to all the world, and has paid all taxes levied and assessed thereon since June, 1883. It is expressly found that at the time of the commencement of the action plaintiff was the owner and seised in fee of the premises. These findings justified a decree quieting the title of plaintiff against an outlawed mortgage, which is not found to have ever been a lien upon the title of plaintiff. If the lien of appellant's mortgage was ever a lien upon plaintiff's title, the burden was upon the defendant to show it. He has not done it.

We have not overlooked the argument of appellant that because it is found that Cary owned an interest in the premises in 1854, which is prior to the date of the deed from the state land commissioners to the grantor of plaintiff, we must infer that plaintiff's title was derived from Cary, or is in some way subordinate to the title of Cary. While this condition suggests some uncertainty as to the facts, any uncertainty in findings must be construed so as to uphold the judgment rather than to defeat it. (*Breeze v. Brooks*, 97 Cal. 72, [31 Pac. 742].)

Certain it is that justice does not demand that we construe uncertainties in findings so as to give any sort of vitality to a claim forty-five years past due, and on its face bearing interest at three per cent per month, and for which (as appears by the findings) the present holder paid nothing.

Appellant has not called our attention to any error occurring at the trial, but has confined himself to an attack upon the judgment as not supported by the findings.

The judgment and order are affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 30, 1907, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 1, 1907.

[Civ. No. 242. Third Appellate District.—March 5, 1907.]

MARY POPE MURPHY and FLORENCE POPE FRANK,
Respondents, v. **UNION TRUST COMPANY, etc.,** Re-
spondent; **RUDOLPH SPRECKELS,** Intervener, Ap-
pellant.

**TRUSTS—SALES BY TRUSTEE—CONFIRMATION BY COURT—ABSENCE OF
LAW—TERMS OF INSTRUMENT CONTROLLING.**—In the absence of
express law in this state requiring sales of property by a trustee,
testamentary or otherwise, to be confirmed by a court, resort must
be had to the terms of the instrument creating the trust and defining
the duties of the trustee in determining whether the power of sale is
unqualified or not subject, under any circumstances, to be con-
trolled or interfered with by a court.

**ID.—POWER OF TRUSTEE TO REINVEST AND TO SELL—CONFIRMATION—
SPECIFIC PERFORMANCE—WANT OF JURISDICTION.**—Where the in-
strument creating the trust vested the trustee with full title and
power to change the investment and to reinvest with full power of
sale in relation to the real property, the superior court had no jar-
isdiction of a petition by the trustee to confirm a proposed bid, un-
less a higher bid is obtained in court, or of an intervention by the
proposed purchaser to enforce a confirmation of the sale by way of
specific performance of an alleged contract of sale, and the court
properly dismissed both proceedings, without reference to the moot
question whether the alleged contract of sale did or did not exist.

APPEAL from a judgment of the Superior Court of the
City and County of San Francisco, and from an order deny-
ing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Bishop, Wheeler, Hoefler, for Intervener and Appellant.

James L. Robison, for Plaintiffs, Respondents.

Hiller & Powers, for Union Trust Company, Respondent.

HART, J.—The respondent, Union Trust Company, a cor-
poration, as trustee upon certain trusts declared in the last
will and testament, and a codicil thereto, of Andrew J. Pope,

who died in the city of San Francisco about the eighteenth day of December, 1878, acquired and became seised in fee of certain real property situated in said city and county of San Francisco. In the month of September or October, 1902 (it is not clear which), Rudolph Spreckels, intervener and appellant, and I. W. Hellman, Jr., the secretary and cashier of the defendant corporation, had a conversation relative to said real property, and in which Mr. Spreckels made an offer to Mr. Hellman to buy said property for the sum of \$226,000. After some discussion by the parties of the proposition, Mr. Hellman, according to his own testimony, said to Mr. Spreckels: "I will tell you how we can arrange this; we will go into court, make the statement that we are offered \$226,000, and ask the court to confirm it, and then, if there are any other parties that wish to raise the bid they can come forward and do so." There is little, if any, variance between Mr. Spreckels and Mr. Hellman as to the purport of the conversation to which we refer.

On the twenty-first day of October, 1902, Mary Pope Murphy and Florence Pope Frank, *cestuis que trustent* under the trust declared and created by the said will of Andrew J. Pope, deceased, instituted suit in the superior court of the city and county of San Francisco against the defendant and respondent, Union Trust Company, for the purpose of presenting to the court the proposition of Mr. Spreckels to purchase said property, and, according to the prayer of the complaint, to secure an order or decree of the court, directing "the defendant to sell and convey the said premises for the said sum of \$226,000, or such other sum as may be obtained therefor, subject to the confirmation by this court."

The defendant filed an answer to the complaint denying the averments thereof and alleging that "the defendant has the absolute authority and discretion, under the decrees of distribution, and the will and codicil mentioned in plaintiffs' complaint, to sell and convey any or all of the property belonging to said trust estate, and to reinvest the proceeds thereof in other investments, securities or other properties, at its absolute discretion; but the defendant is unwilling to sell and convey the real property particularly described in plaintiffs' complaint for the sum of \$226,000, and is willing to sell said real property at a greater price than \$226,000, if this honorable court will confirm the sale thereof."

On the thirty-first day of October, 1902, Rudolph Spreckels, having previously been granted leave so to do by the court, filed a complaint in intervention. After confirming by appropriate averments the allegations of plaintiffs' complaint as to the offer of the sum of \$226,000 for said property and alleging the fairness of the price thus offered, the intervenor's complaint proceeds to allege that: "Intervenor further avers that the defendant, Union Trust Company of San Francisco, then and there accepted the said offer subject only to the condition that this honorable court would confirm the said sale, and then and there agreed with intervenor that the intervenor should buy from it, the said Union Trust Company of San Francisco, and the said Union Trust Company of San Francisco should sell to him, and the said intervenor, the real property in said complaint described for the said sum of two hundred and twenty-six thousand dollars, provided that this Honorable Court would confirm the said sale." The complaint in intervention also alleges that "intervenor is ready and willing to complete the said purchase." The prayer of intervenor's complaint is "that the said sale be confirmed and that the defendant be directed to make, execute and deliver to said intervenor a good and sufficient deed of conveyance conveying the said property with a merchantable title to this intervenor," etc.

Mary Pope Murphy and Florence Pope Frank, beneficiaries, as before explained, of the trust herein mentioned, and plaintiffs in the original complaint, and the defendant, Union Trust Company, each interposed an answer to the complaint in intervention, specifically denying the averments thereof. The complaint, as well as the complaint in intervention, is verified. The answer of the defendant to the complaint in intervention, among other averments, contains the following: "Further answering this complaint of intervenor, this defendant alleges that it, as trustee of the trust set forth in the complaint of plaintiffs, had a verbal understanding, and no other, on or about October 1st, 1902, with said intervenor, that it would sell the real property described in the complaint of plaintiffs, to said intervenor, for two hundred and twenty-six thousand dollars, provided that no higher sum than two hundred and twenty-six thousand dollars was offered by third persons therefor through bids made in this Honorable Court, and provided further, that the sale to said intervenor of said

property for the sum of two hundred and twenty-six thousand dollars, or the sale to a third person bidding more than two hundred and twenty-six thousand dollars, as hereinabove mentioned, should receive the confirmation of this Honorable Court."

Upon the issues thus made up, a trial was had and judgment went for the defendant, dismissing both the complaint and the complaint in intervention. A motion for a new trial was made by intervener and refused by the court. The intervener appeals from the judgment and from the order denying his motion for a new trial.

The court, from the evidence adduced, found that within ten days prior to the commencement of this action, as alleged in the complaint, the defendant, as trustee, was offered the sum of \$226,000 for the real property involved in this controversy, and that the plaintiffs, as beneficiaries under the trust, requested the defendant, as trustee, before the inauguration of the suit, to make a sale and conveyance of the "said real property, and the defendant refused to do so"; that the said offer of \$226,000 was made for said real property to defendant by the intervener, Rudolph Spreckels; that the "defendant did not at any time agree with the intervener that the intervener should buy from it, or that the defendant should sell to the said intervener, the real property in said complaint described, for the said sum of \$226,000 or for any other sum. That the defendant did not at any time agree with the intervener that the intervener should buy from it, or that the defendant should sell to the said intervener, the real property in said complaint described, for the said sum of \$226,000, or for any other sum, provided that this court would confirm said sale." The court concluded as a matter of law, from the facts found, that "the defendant, as trustee as aforesaid, is vested with full power and authority to manage the said trust property, and to exercise its own discretion as to when, and how, and to whom, and upon what terms, and for what consideration it shall or may sell and convey the same, without any order or direction of this court in the premises," etc.

At the trial there was received in evidence, over the objection of intervener, a written offer signed by one Henry Kahn, and addressed to defendant, to purchase the property in dispute for the sum of \$230,000, or \$4,000 in excess of the sum offered by Mr. Spreckels. Accompanying this offer was a

check for \$5,000, payable to the order of defendant, and tendered as a deposit or payment on account of said proposed purchase price.

Counsel for respondents contend that, so far as the intervener is concerned, the proceeding here is in the nature of and nothing less than a suit for the specific performance of a contract to sell real property. This contention is opposed by appellant. It is claimed by him that the proceeding, "although cast in the form of a civil action," to adopt the language of his counsel, "amounts to no more than a report by a trustee to the court, of the fact that a contract of sale had been made by him and a request of the judgment of the court confirming his action in making the contract." In its practical purpose and effect, it would at least appear that the relief sought by the suit is that suggested by counsel for respondents. But we do not feel at liberty to consider the case from that point of view. We deem it our duty rather to confine ourselves in the consideration of the record and in reaching a conclusion on this appeal to the theory upon which the cause was tried in the lower court and as presented here by appellant. And we do not, therefore, feel called upon to declare whether or not, as within the scope of intervener's complaint and the issues, a decree specifically enforcing the performance of the alleged contract, assuming the evidence warranted it, could appropriately have been demanded. We shall, as we have declared, direct our investigations toward the solution of the question of whether or not the proceeding, under the theory of appellant as the case was presented in the court below and urged upon this appeal, was one by which the controversy upon the merits could be definitively or at all determined and settled by the court. What we are asked to do is (to quote from appellant's brief) "to reverse the judgment for failure of the evidence to support the finding that no contract was made, and *direct the lower court to enter a judgment confirming the sale*, in accordance with the evidence introduced."

Although several questions are presented and discussed by counsel, there is, after all, in the consideration of the case upon appellant's theory, but one point necessary to be noticed and determined, which may be stated in the form of a question, thus: Was it within the duty of the court under the law, viewed through the circumstances developed at the trial, to order a confirmation of the sale, assuming that a perfect agree-

ment by defendant to sell to intervener had been made, and assuming that "no further and higher bids" had been offered for the property? This question involves, of course, the jurisdiction of the court to act in the premises, and its decision must depend upon the proposition, first, of whether there is any rule of law requiring confirmation in such a case, and second, if there be no law upon the subject, then upon the nature and extent of the authority with reference to the trust property vested in the trustee by the terms and provisions of the will declaring the trusts. If the trustee is clothed, by the instrument creating and declaring the trusts, with plenary and discretionary authority to conclude a contract for the sale and disposition and investment of the trust property and funds, subject, of course, to the purposes of the trust, without the intervention or supervisory control of the court, either by the commands of the trust clauses of the will or of law, then this proceeding under the issues as framed and presented must be held to have been entirely gratuitous or *coram non judice*.

As to the first proposition, there cannot be found in our law any express requirement that sales of property by a trustee, testamentary or otherwise, shall be confirmed by a court. And it is admitted by appellant "that there is no decision in this state fixing the rules upon which a court may or may not refuse to confirm the sale of a trustee," although he undertakes to maintain that upon the court is imposed the legal duty of confirming the sale of the trustee here by analogy to the court's power and *duty* to confirm the sale of an executor. But as to whether this last-mentioned position would or would not be maintainable under certain special circumstances, it is not necessary for us to decide. We are, in the absence of express law requiring the confirmation of a sale by a testamentary or other trustee of an express trust, to look to the instrument creating such officer and defining his duties, for the purpose of ascertaining with what authority over the trust property he is clothed by said instrument, and whether such authority is without qualification or not subject under any circumstances to be controlled or interfered with by a court.

The last will and testament of the deceased was admitted in evidence, and we find that the powers granted thereby to the trustee over the trust property are defined in the following language: "and I give and bequeath to said three trustees

(the predecessors of defendant) the sum of one hundred thousand dollars upon trust to invest the same in their names in any funds or securities of the United States or of the City and County of San Francisco, then considered responsible and permanent, or in improved real estate in the City of San Francisco, or to place the same out at mortgage on real securities in this state, or in any other state in the United States, with the liberty to change the investment or investments at their discretion for any other, of the kind above described, and to accumulate the yearly income and profits by similar investments," etc. It will at once be observed from the language thus quoted from the trust clause of the will of the deceased, that there can be nothing clearer than that the testator intended to, and did thereby, confer upon the trustees, and their successor, defendant, full, complete and unquestionable discretionary power and authority to deal with the property made the subject of the trust. Indeed, the language of the trust clause is so plain and free from ambiguity that there is even no dispute here as to what the testator meant and intended by it, for in their opening brief, counsel for appellant say that "the Union Trust Company, defendant herein, holds title to a certain piece of real property situated in San Francisco, on the corner of Summer and Montgomery streets, as trustee under the will of Andrew J. Pope, *having full powers of sale in relation thereto.*"

We think the court was without jurisdiction in the matter. The trustee, under the terms of the instrument of its creation, has, as seen, absolute discretion vested in it to dispose of the trust property without referring a proposed sale to the court for its judgment as to whether the sale or contract of sale should be consummated or not. There is, admittedly, no law, either legislative or deducible from judicial construction, in this state, which, under the circumstances of the case at bar, authorizes any such proceeding, and in the absence of any authority for any such proceeding in the trust clause of the will of the deceased, the same could amount to no more than if the parties had agreed to refer the proposition of sale to some third party, who could, of course, act or not act upon the matter, according to his own pleasure. The court below, after hearing the evidence and thus learning the nature of the proceeding, concluded, as a matter of law, that no duty devolved upon it to act in the matter, and properly, we think, dismissed

the complaints. The authorities cited by counsel relate to the duty of the court in the case of the sale of property by an executor. They are not in point here. A court having jurisdiction of proceedings involving the estates of deceased persons always retains jurisdiction over such estates until their final settlement and the discharge of the executor or administrator. The law charges courts with the exercise of special care and control over such proceedings, and the statute expressly provides for and requires the concurrence of the court in sales by executors and administrators of property belonging to the estates of deceased persons. In the case of trust property, as we have shown and as has been conceded, there is no such duty expressly imposed upon the court by the law, and the court cannot acquire jurisdiction to exercise or perform such duty in such a case by the mere agreement of the parties. We hold that the proceeding as presented submitted for the decision of the court a moot question only, and that the court's action in dismissing the complaints was absolutely proper. From this view of the case, it is apparent that whether the evidence supports the findings of the court as to the alleged contract, or whether the evidence might or might not sustain a decree for the specific performance of the alleged contract of sale, if such relief may be said to be within the fair import of the complaint in intervention, are questions which, as we have before indicated, possess no significance or importance.

Judgment and order are affirmed.

Burnett, J., and Chipman, P. J., concurred.

[Crim. No. 81. First Appellate District.—March 6, 1907.]

Ex Parte WILLIAM R. VICE, on Habeas Corpus.

HABEAS CORPUS—CRIMINAL LAW—EMBEZZLEMENT—UNLAWFUL COMMITMENT—STATUTE OF LIMITATIONS.—A prisoner who is held to answer upon a criminal charge of embezzlement, which is barred by the statute of limitations of three years after the commission of the offense, is unlawfully imprisoned without reasonable or probable cause, and is entitled to be discharged upon a writ of *habeas corpus*.

Id.—EMBEZZLEMENT BY PASSENGER AGENT OF RAILROAD COMPANY—KNOWLEDGE OF OFFICIALS—DEMAND UNNECESSARY.—Where the de-

fendant as passenger agent of a railroad company embezzled money for the sale of tickets by appropriating the same to his own use, which was known to the officers of the company when he left its employment, no demand for its return was necessary to constitute the offense.

ID.—RESIDENCE IN STATE—ASSUMED NAME—RUNNING OF STATUTE—

Where the defendant resided in this state from the time of the commission of the offense, the fact that he used an assumed name in another part of the state does not constitute any exception to prevent the running of the statute of limitations. He was "an inhabitant of or usually resident within the state," no matter what name he assumed.

WRIT of *habeas corpus* to the Sheriff of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Lewis H. Smith, and R. E. Rhodes, for Petitioner.

George A. Knight, Aylett R. Cotton, and Robert Harrison, for Respondent.

COOPER, P. J.—It is alleged in the petition that the prisoner is unlawfully imprisoned and restrained of his liberty by Thomas F. O'Neil, sheriff of the city and county of San Francisco. The imprisonment is claimed to be unlawful for the alleged reason that the prisoner has been committed and held to answer by a judge of the police court of the said city on a criminal charge of embezzlement without reasonable or probable cause. This is made a ground for discharging a party in *habeas corpus* proceedings. (Pen. Code, sec. 1487, subd. 7.) And a discharge in such case is the rule in the supreme court. (*Ex parte Starnes*, 82 Cal. 245, [23 Pac. 38]; *In re Kennedy*, 144 Cal. 635, [103 Am. St. Rep. 117, 78 Pac. 34].)

The commitment in this case, so far as material here, is as follows: "The People of the State of California to the Sheriff of the City and County of San Francisco: An order having this day been made by me, that William Robert Vice, complained of as W. R. Vice, be held to answer upon a charge of felony, to wit: embezzlement, committed as follows: said William Robert Vice, complained of as W. R. Vice, did in the City and County of San Francisco, State of California, on

or about the 24th day of October, 1906, who on or about the 13th day of April, A. D. 1903, was the Clerk, agent and servant of Union Pacific Railroad Co., a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and doing business in the City and County of San Francisco, and then and there by virtue of his said employment and trust as such clerk, agent and servant on or about the 13th day of April, 1903, there came into the possession, care, custody and control of him the said William Robert Vice, complained of as W. R. Vice, five hundred and eighty-four dollars in lawful money of the United States of America, of the value of five hundred and eighty-four dollars, in lawful money of the United States of America, and the personal property of the said Union Pacific Railroad Co., a corporation as aforesaid, and he, the said William Robert Vice, complained of as W. R. Vice, after the said personal property had come into his possession, care, custody and control, as aforesaid, did, to wit, at said City and County of San Francisco, on or about said 24th day of October, A. D. 1906, willfully, unlawfully, fraudulently and feloniously convert, embezzle and appropriate the same to his own use, contrary to his trust as such clerk, agent and servant; and not in the due and lawful execution of his said trust and employment.

"You are commanded to receive him the said William Robert Vice, complained of as W. R. Vice, in your custody, and detain him until he be legally discharged."

It is provided in the Penal Code (section 800): "An indictment for any other felony than murder, the embezzlement of public money, or the falsification of public records, must be found, or an information filed, within three years after its commission."

Section 802 provides that if when the offense is committed, "the defendant is out of the state the indictment may be found, or an information filed, within the term herein limited after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within, this state is part of the limitation."

There is no claim that defendant embezzled public money, nor that he was out of the state when the offense was committed. We are clearly of the opinion that unless it was made to appear that the offense was committed within three years prior to the commitment, there was no reasonable or

probable cause for holding the defendant. The evidence taken down before the magistrate is before us, and the facts are not disputed.

It appears that on April 13, 1903, the prisoner was in the employ of the Union Pacific Railroad Company as their passenger agent in the city and county of San Francisco. His duties were the usual duties of a passenger agent, to solicit passenger business, collect money from passengers for tickets, and deliver tickets to them, and to act as the representative of the company generally in handling such business, and has been in such employ since 1890. On the said thirteenth day of April, 1903, he sold as such agent to one Newman certain passenger tickets to be thereafter delivered over the lines of the Union Pacific Railroad, and collected from Newman for said Union Pacific Railroad the sum of \$584, which he failed to account for or pay over, but appropriated to his own use. Prior to May 1, 1903, some question arose, and the question was discussed as to Vice giving proper accounts of the moneys received for tickets, and on that day he was discharged, or at least left the employ of the Union Pacific Railroad Company. The officers of said railroad company knew the fact that Vice had collected the money and failed to pay it over about the time he was discharged. After he left the employ of the railroad company he immediately went to Madera, in Madera county, in this state, and has ever since continued to reside in that county under the assumed name of Thomas R. Ryan. He openly resided and attended to business in said county of Madera during all this time, but under said assumed name. On October 24, 1906, demand was made upon Vice by said Union Pacific Railroad Company for said \$584, but he has never turned it over or paid it to said company. The complaint was filed in said police court on October 25, 1906, charging the prisoner with the crime of embezzlement.

We are of the opinion that the crime had become barred by the statute before the prisoner was arrested. He embezzled the money when he appropriated it to his own use. It was his duty, as the agent of the railroad company, to pay over and account for the money he received as such agent at the time he received it, or certainly by the 1st of May, 1903, when he left the employ of the company. He could have been arrested as soon as he failed to turn over the money to his employer and appropriated it to his own use. A demand was

not necessary. It is not necessary under any section of the Penal Code to which our attention has been called, and we have found no such section. There are cases in this state where the party charged has held the funds as trustee, or in some official capacity, and the evidence has failed to show any party to whom the defendant could legally turn over the funds, and in such cases it has been held that the crime was not proven. Thus, in *People v. Royce*, 106 Cal. 173, [37 Pac. 630, 39 Pac. 524], the defendant was treasurer of the Veterans' Home Association, and deposited the money in a bank to his personal account. It did not appear that he was ever called upon to apply the money to any need of the association, or to make any particular use of it, or to put it in any special place, or that any demand was ever made upon him for the money. It was held that such facts were not sufficient evidence upon which to convict defendant of embezzlement, but the court said, "No doubt embezzlement may be established, under certain circumstances, without proof of a demand, as where other evidence clearly shows an appropriation by an employee of his employer's funds with intent to do so fraudulently and feloniously."

In *People v. Page*, 116 Cal. 394, [48 Pac. 326], the defendant was guardian of an insane person, and as such guardian had the right to the money in his custody subject to the orders of the court. He had drawn the money he held in trust from the Savings and Loan Society, but it did not appear what he did with it. The court, in holding the evidence to be insufficient to justify the verdict, said: "So far as appears the defendant at the time of the trial may have still had the money ready to be paid over on demand to anyone authorized to receive it."

The supreme court of Arizona in a late case (*Territory v. Munros* (Ariz.), 85 Pac. 651) expressly hold that a demand is not necessary. The language of the court is: "In our view the offense, which is purely statutory, is complete when the property is fraudulently converted. Refusal to return the property upon demand has always been held to be evidence, and in some cases indispensable evidence of intentional conversion."

In volume 10, *American and English Encyclopedia of Law*, page 995, second edition, it is said: "Unless the statute thus

requires it a demand is not necessary." (See the cases cited in support of the text in note 5, *Id.*)

It, then, being clear that the crime for which the prisoner was committed is barred by the statute of limitations, was there reasonable or probable cause for holding him to answer? The mandate of the statute is plain that the information *must be filed* within *three years* after the crime has been committed. Is there reasonable or probable cause for holding a defendant in the face of the statute, and under a state of facts which would not justify a conviction? Reasonable or probable cause means such a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty. There must be a probability that a crime has been committed by the person named in the commitment, and not only that a crime has been committed but that it is one that has not become barred by the statute of limitations. There certainly would be no justification for a magistrate holding a defendant to answer in a criminal case, and causing the county to incur the expense of a trial in a case where it is plain that there is no probability that defendant can be convicted. This is not a case in which it is uncertain as to whether or not the offense has become barred by the statute. There is no conflict as to when the crime was committed. The evidence shows that the accused does not come within the exceptions named in section 799 or 802 of the Penal Code. It is urged on behalf of the prosecution that because the defendant went under an assumed name after he went to Madera county, that for this reason he was not "an inhabitant of, or usually resident within this state" during such time. We cannot take this view of the matter. He was an inhabitant of the state, and usually resident within it, no matter what name he assumed. The legislature has prescribed the period of limitation for the prosecution of criminal cases. It has named the exceptions in which the case is taken out of the statute. It is not for the courts to legislate or add to the statute. It is the duty of the courts to interpret the law according to its true meaning and intent, even if the consequences are not what could be desired. It is of much greater importance that the

rules and interpretations should be certain, consistent, and applied alike to all, than that some particular case should meet with its just punishment.

Let the prisoner be discharged.

Hall, J., and Kerrigan, J., concurred.

[Crim. No. 54. Second Appellate District.—March 9, 1907.]

Application of J. L. KIDD for Writ of Habeas Corpus.

MUNICIPAL ORDINANCE—POLICE POWER—RESTRICTION OF LIQUOR TRAFFIC.—The law-making power of a municipal corporation has the right, under the police power, to restrict the sale of intoxicating liquors; and a municipal ordinance prohibiting the sale of all intoxicating liquors therein, excepting a specified permission to hotel-keepers to sell vinous and malt liquors served in the dining-room thereof as part of a regular meal, is a valid exercise of the police power of the municipality.

DO.—CONSTITUTIONAL LAW—UNIFORMITY IN OPERATION.—The constitutional requirement with reference to the uniformity in operation of all laws of a general nature has no application to ordinances enacted in pursuance of the police power to regulate the liquor traffic, in which there is an unjust discrimination.

ID.—NO INHERENT RIGHT TO ENGAGE IN LIQUOR TRAFFIC—OPERATION OF EXCEPTION.—There is no inherent right in a citizen to engage in the sale of intoxicating liquors; and where an exception to the ordinance prohibiting such right is based upon a reasonable distinction, and applies alike to all hotel-keepers of the class excepted, one not belonging to that class, who is imprisoned for a violation of the ordinance, has no just cause of complaint, by reason of the exception.

APPLICATION for writ of *habeas corpus* to test the validity of imprisonment for violation of an ordinance of the city of Riverside.

The facts are stated in the opinion of the court.

Thomas T. Porteous, for Petitioner.

W. A. Purington, City Attorney, for Respondent.

ALLEN, P. J.—Application by petitioner for writ of *habeas corpus* based upon the claim that his imprisonment for the vio-

lation of an ordinance of the city of Riverside is illegal, because the ordinance so violated is unconstitutional and void.

This ordinance, regularly adopted, in plain terms prohibits the sale of all intoxicating liquors in said city by any person, except that the council may issue a permit to keepers of hotels having forty bedrooms or more to sell vinous and malt liquors served in the dining-room thereof as part of a regular meal. The ordinance is claimed to destroy petitioner's right to engage in business upon the same terms as other citizens, and that it creates a monopoly in favor of a certain class. Let the correctness of his conclusions be assumed, and we have a case where the law-making power is regulating a business, the tendency of which is injurious to the public morals, safety and welfare. "The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than any other source. . . . There is no inherent right in a citizen thus to sell intoxicating liquors." (*Foster v. Police Commissioners*, 102 Cal. 491, [37 Pac. 763].) It is only a calling not in any way injurious to the community which every one has a right to pursue. (*In re Parrott*, 6 Saw. 349, [1 Fed. 481].) That the legislative power may prohibit a traffic by retail of intoxicating liquors is conceded.

If the governing power can prohibit a thing altogether, it may impose such conditions upon its existence as it pleases, even arbitrary ones. (*Ex parte Christensen*, 85 Cal. 213, [24 Pac. 747].) The constitutional requirement with reference to the uniformity in operation of all laws of a general nature has no application to ordinances enacted in pursuance of a legitimate exercise of the police power, and only when it is manifest that there is an unjust discrimination do courts interfere. (*In re Zhizhuzza*, 147 Cal. 334, [81 Pac. 955].) There being no inherent right to engage in the business involved in this ordinance, the operation of the exception applying alike to all of the class so excepted, petitioner, not being of that class, and in no wise affected by its operation upon the class, has no cause of complaint. Petitioner presents no instance of unjust discrimination. The right to classify exists. The difference in the relation which the ordinary retail liquor dealer occupies from that of a regular hotel-keeper, whose business is that of entertaining guests and serving vinous and malt liquors with meals "suggests a reason which might rationally

be held to justify the diversity in the legislation." (*Bloss v. Lewis*, 109 Cal. 499, [41 Pac. 1081].)

The ordinance, in our opinion, is valid and a proper one to be enacted in the exercise of police power.

Writ denied.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 851. Second Appellate District.—March 9, 1907.]

In the Matter of the Estate of WILLIAM HENRY KILBORN, Deceased. JULIA ANN KILBORN et al., Appellants, v. TITLE INSURANCE AND TRUST COMPANY, Respondent.

ESTATES OF DECEASED PERSONS—PROBATE OF WILL—INSUFFICIENT OBJECTIONS.—Objections to the probate of a will, that the testator had, after the date thereof, executed a general power of attorney to his wife, and believed that the will had been revoked; that certain provisions and directions therein contained were invalid; and that the will was not the will of the testator, without the statement of facts to justify such conclusion—were insufficient, and a general demurrer thereto was properly sustained.

ID.—EFFECT OF POWER OF ATTORNEY—WILL NOT REVOKED.—The general power of attorney to the wife of the testator ceased to be operative upon the death of the testator; and its execution could in no sense be given effect as a revocation of the prior duly executed will.

ID.—SCOPE OF HEARING ON PROBATE—DUE EXECUTION—VALIDITY OF PROVISIONS.—The court, upon the hearing of a petition for the probate of a will, is called upon merely to determine the validity of its execution. The sufficiency or invalidity of its provisions cannot then be determined, but will be determined when effect is sought to be given to them.

ID.—ORDER GRANTING LETTERS TO QUALIFIED CORPORATION—BOND NOT REQUIRED.—An order granting letters testamentary to a corporation named as coexecutor, and qualified to act as such under its articles of incorporation, and having a paid-up capital stock of \$250,000, without requiring any bond therefrom, was justified, under the provisions of the act of April 6, 1891 (Stats. 1891, p. 490), where no objection was raised as to the solvency or financial responsibility of such corporation.

5 Cal. App.—11

ID.—STATUTE NOT SPECIAL LEGISLATION.—The fact that a special undertaking is required from individuals, and not from a corporation having the required capital, does not render the act of 1891 invalid as special legislation. The manner of affording ample security to those interested in the estate, before appointment, is the subject of general law; and the kind, character and extent of the security is matter for the legislature to determine.

ID.—POWER OF COURT TO PROVIDE AMPLE SECURITY.—Where the security is for any reason insufficient, the court has general power to provide further security, if satisfied that the interests of the estate demand it; and this power extends, in such case, to requiring additional security from a testamentary corporation, in addition to the security arising from its paid-up capital.

APPEAL from a judgment of the Superior Court of Los Angeles County, admitting a will to probate, and from an order appointing a corporation executor without bond. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Will D. Gould, and E. C. Oggel, for Appellants.

Morton, Houser & Jones, for Respondent.

ALLEN, P. J.—Appeal from a judgment and order admitting a will to probate, and an order appointing respondent coexecutor thereunder without preliminary undertaking.

The facts are these: One W. H. Kilborn died seised of certain property in this state, leaving a will by which all of such property subject to testamentary disposition was devised to his wife, the appellant, and the Title Insurance and Trust Company, a corporation, as cotrustees, with directions to convert all of his real estate into money, invest and reinvest the proceeds, and pay the income thereof quarterly to a daughter during her life, if she should need the same for her comfortable support, and in the event such income should prove insufficient for such support, then such amount of the principal as the probate court might order. After the death of the daughter, the estate remaining, after payment of certain specified legacies, was devised to the heirs of the testator in the proportion and amount to which they would be entitled under the succession laws of California.

This will was filed for probate by the respondent corporation, accompanied by the usual petition, to the probate of which the widow, who had acquired by assignment all interest of the other beneficiaries specifically named, objected because she averred that the testator had executed a general power of attorney to her after the date of said will, and said testator believed that the will had been revoked. Then followed twenty other objections to said probate, none of which related to the validity of the execution of the will, but all as to the sufficiency and validity of certain provisions and directions therein contained, with the exception of objection "r"; which is the statement of a conclusion that the instrument is not the will of the testator, but no facts are set out warranting such conclusion.

The court sustained a demurrer to these objections, and the contestant not desiring to amend the same, proof was taken as required by section 1317, Code of Civil Procedure, and the will was ordered admitted to probate and a certificate thereof, duly signed, was filed. Thereupon, the widow filed her objections to the granting of letters testamentary to petitioner as coexecutor and trustee, assigning as objections the fact that she was the sole party interested in the estate; that the appointment of petitioner would entail unnecessary expense upon the estate, and that the petitioner had no capacity or authority to act as coexecutor or cotrustee. These objections were overruled by the court and the widow and respondent were appointed coexecutors of such will. The widow accepted the appointment as executor, executed her undertaking and qualified. The court by its order directed letters testamentary to issue to respondent without an independent undertaking.

We perceive no error in the action of the court sustaining the demurrer to the objections filed to the probate of the will. The execution of the subsequent power of attorney to the widow was a matter of no consequence. It ceased to be operative upon the death of the decedent, and its execution could in no sense be given effect as a revocation of the prior duly executed will. The court upon a petition for the probate of a will is called upon merely to determine the validity of its execution. "The sufficiency or invalidity of its provisions will be determined when effect is sought to be given to them." (*Estate of Pforr*, 144 Cal. 125, [77 Pac. 825].)

The evidence warranted the finding that the will was duly executed, and that the testator was of sound and disposing mind and memory at the time of its execution, and not acting under duress, menace, fraud or undue influence.

Under the act of April 6, 1891 (Stats. 1891, p. 490), respondent corporation was authorized by its articles of incorporation to act as executor, and was competent and eligible to appointment; and being named in the will as one of the executors, it was the duty of the court to so appoint, unless the objections thereto were of a character warranting the court in withholding such appointment. None of the objections filed had such an effect. It will be noted that there was no objection to the solvency or insolvency of the respondent, or its financial responsibility.

Appellant presents with much earnestness a question which relates to the authority of the court to order the issuance of letters testamentary to the respondent without bond. This order is justified by the provisions of the act of 1891, above referred to, which in terms provide that when a corporation having a paid-up capital stock of \$250,000 is authorized by its articles of incorporation to act as executor, it must be appointed without bond or security other than that afforded by the deposit of securities of the value of \$200,000 with the treasurer of state; and that before accepting such trust the corporation must procure a certificate from the board of bank commissioners stating that it has complied with the requirements of this law; and further provides that the revocation of such certificate shall be cause for the removal of said corporation from such trust.

It is insisted that the general law requires a preliminary undertaking from all persons, and that this statute excepts from its operation a class, and, therefore, the uniformity of the general law is destroyed. The manner of affording ample security to those interested in the estate before appointment is the subject matter of the general law. What that security shall be, its kind, character and extent, is a matter for the legislature; and as said by the supreme court of Minnesota in the case of *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, [41 N. W. 232], "if they deem the securities deposited with the State Auditor, and the other safeguards placed by the statute around the organization and management of such corporations, to insure the faithful execution of all trusts imposed

upon them as an equivalent for the bond and oath required of natural persons, they have the undoubted power so to provide." It is a matter of no concern to the coexecutor or devisees under the will how such security is afforded, provided it is ample for their protection. This protection deemed by the legislature to be ample is provided under the general law and under the act above mentioned. The court is shorn of no power in connection with its probate jurisdiction. The certificate of the bank commissioners is made evidence proper for the court to receive in determining the solvency of the corporation and the propriety of its appointment, but such certificate is not conclusive evidence of any of such facts. Section 1349, Code of Civil Procedure, provides that the court may, upon objections, decline to appoint an executor, although named in the will. Appellant made no objection to the appointment of the respondent based upon any facts tending to show that its financial condition and its securities on deposit were not such as to afford ample protection to the estate. Had such objections been made, notwithstanding the certificate of the bank commissioners, it would have been within the power of the court to inquire into the financial condition of the petitioner, and if it should appear that the assets were insufficient as security for the faithful performance of the trust, to have refused the appointment. Those sections of the general law which give to the court authority to require additional security from an executor when it is made to appear that the original undertaking is insufficient for any reason apply to the equivalent of the bond given by a corporation; and even though a court may in the first instance appoint a corporation as executor without bond, yet at any time during the administration of the trust, under these sections, it may require further and additional security if satisfied that the interests of the estate demand it. This act, therefore, in our opinion, grants no privilege or immunity to a corporation. By the terms of the act the corporation is required to amply secure those interested in the estate from loss. Natural persons are required to do neither more nor less; and while the manner of furnishing the security is different, one is the equivalent of the other and the burden is alike upon each.

There is no error apparent in the record, and the judgment and order are affirmed.

Shaw, J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 8, 1907.

[Civ. No. 278. First Appellate District.—March 11, 1907.]

**LAGUNA DRAINAGE DISTRICT, Respondent, v.
CHARLES MARTIN COMPANY, Appellant.**

ACTION TO CONDEMN LAND FOR DRAINAGE DISTRICT—SECOND APPEAL—

LAW OF CASE.—In an action to condemn a strip of land for the use of a drainage district, where the sufficiency of the complaint and the question as to the constitutionality of the act under which the drainage district was organized were determined upon a former appeal, such determination is the law of the case, and those questions will not be considered upon a second appeal.

ID.—FORMER JUDGMENT IN PRIOR ACTION FOR SAME CAUSE—STIPULATED

JUDGMENT AS TO DIFFERENT LAND NOT A BAR.—A former judgment in a prior action for the same cause against the defendants' predecessor, which was rendered by stipulation, for a pipe-line over different land, is only conclusive as to the land occupied by the pipe-line, and is not a bar to another action to condemn the strip claimed but not adjudicated in the prior action.

ID.—EFFECT OF STIPULATED JUDGMENT—WITHDRAWN CLAIM NOT

ABANDONED.—By the stipulated judgment for an easement upon different land, the claim for the land described in the complaint was in effect withdrawn, and the judgment can have no greater effect than if the complaint had asked for an easement to lay the pipe-line over the precise location described in the judgment. It did not have the effect to show that the plaintiff agreed to abandon forever its right to condemn the land in controversy.

ID.—DRAINAGE DITCH A PUBLIC USE—NECESSITY FOR DRAINAGE—DE-

TERMINATION OF BOARD CONCLUSIVE.—The legislature having declared that a ditch or aqueduct for draining and reclaiming lands is a public use, the determination by the board of trustees of the drainage district as to the necessity for draining the district is final, and not subject to review by the courts.

ID.—PROOF OF NECESSITY FOR TAKING LAND OF DEFENDANT—SUPPORT

OF VERDICT.—While the drainage district is required to show by proof that the taking of the strip of land claimed from the defendant was necessary for such drainage, it is held that the evidence

as to such necessity is sufficient to support the verdict for the plaintiff.

ID.—DAMAGE TO LAND NOT TAKEN.—*Held*, that the question of damages to the parcel of land not sought to be condemned was fairly submitted to the jury on the evidence, and that its finding as to the amount of damage to such land is a fair deduction from the evidence.

APPEAL from a judgment of the Superior Court of Marin County, and from an order denying a new trial. Thomas J. Lennon, Judge.

The facts are stated in the opinion of the court.

E. S. Lippitt, and F. K. Lippitt, for Appellant.

Thomas J. Geary, for Respondent.

COOPER, P. J.—Action for condemnation. Plaintiff recovered judgment. Defendant has appealed from the judgment, the order denying its motion for a new trial, and an order allowing plaintiff possession of the property pending the appeal.

The complaint alleges that plaintiff is a public corporation created for the purpose of draining a part of the lands of the state included within the boundaries of the drainage district as set forth in the complaint; that it is necessary for the purposes of draining the said district to cut down and excavate the bed of a natural stream leading from the lower end of the said lagoon following the meanderings of the stream, according to the courses and distances set forth in the complaint, the width of the said easement sought being thirty feet; and that the defendant is the owner of the piece or parcel of land sought to be condemned; that the only mode of draining the said district is by deepening the bed of the said stream and placing proper contrivances in the channel where necessary in order to carry the water uninterrupted. It concludes with a prayer that the strip of land may be taken, held and used by plaintiff for the uses and purposes set forth therein, and that the compensation to be paid defendant may be ascertained and fixed.

The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of

action, and upon the further ground that the plaintiff has not the legal capacity to sue, for the reason that the act under which the plaintiff was formed is unconstitutional.

The court below sustained the demurrer. Judgment was accordingly entered for defendant. From that judgment the plaintiff appealed, and the judgment was reversed (*Laguna etc. Dist. v. Chas. Martin Co.*, 144 Cal. 209, [77 Pac. 933].) The supreme court held against defendant on both propositions raised by the demurrer, and fully discussed the question as to the constitutionality of the act under which plaintiff was organized. It thus became the law of the case that the complaint states facts sufficient to entitle the plaintiff to the relief demanded, and that the plaintiff is a valid corporation and authorized to condemn land for its uses and purposes. We will, therefore, not discuss further the argument of defendant's counsel that the act under which the plaintiff was organized is unconstitutional.

Upon the going down of the *remittitur* from the supreme court the defendant filed its answer. It denied that it was necessary to take the land described in the complaint for the uses and purposes of the plaintiff. It also pleaded a former judgment between the same parties by way of estoppel. The case was tried with the assistance of a jury, to whom three interrogatories were propounded and answered as follows:

"Is it necessary that the strip of land described in the complaint be taken by the plaintiff for the uses for which it is sought to be condemned?" Answer: "Yes."

"What is the value of the strip of land sought to be condemned by the plaintiff?" Answer: "One hundred dollars."

"What is the damage to the balance of the land not sought to be condemned by reason of its severance from the land sought to be condemned, and the construction of the improvement proposed by the plaintiff?" Answer: "Five hundred dollars."

Upon this verdict judgment was entered for plaintiff, and in the judgment it is recited: "That the use to which the land sought to be taken and applied is a use authorized by law. The issues in this action were not determined in the judgment pleaded by the defendant in his answer herein; that the judgment described in the answer of defendant and duly offered in evidence by the defendant is not a bar to the prosecution of the present action by the plaintiff, and that

the plaintiff is not estopped from prosecuting the present action by reason of the said judgment." The court also awarded the defendant its costs, taxed at \$123.20.

No error is claimed as to any instruction given the jury, and all the evidence, and the reasonable inferences which the jury might have drawn therefrom, must be called to the support of the verdict. The defendant relies upon certain rulings as prejudicial, and insists that the judgment and orders should be reversed because of such alleged rulings.

The first point urged, and upon which the defendant places the most stress, is the claim that plaintiff is estopped by reason of a former judgment. In the year 1889 the plaintiff commenced a prior action against Charles Martin, the predecessor in interest of the defendant, for the condemnation of substantially the same land sought to be condemned in the present suit, and for the same purpose, to wit, for the purpose of a ditch to convey away the waters, and drain the lands of the district. During the trial of the former suit, and before its conclusion, the parties entered into a stipulation to the effect that in consideration of \$250 the plaintiff should have the right to lay an iron pipe twelve inches in diameter from a point designated at the lower end of the lagoon in a straight line across the lands of Charles Martin, for a distance of about six hundred feet to a curve in the stream, the said pipe to be laid underground and the earth filled upon it, and to be a perpetual easement upon the lands of the said Charles Martin, and an appurtenance to the lands of the plaintiff. The stipulation provided that judgment should be entered accordingly, which was done. The judgment described the location of the pipe, the manner in which it should be laid and maintained, and recited the terms and conditions of the stipulation. The line so described, and over which the pipe was laid, was not over or through the land sought to be condemned for a ditch, either as described in the former action, or in the one at bar. The plaintiff paid Martin the \$250, and the costs incurred, and proceeded to and did lay the twelve-inch pipe in the manner agreed upon and provided in said judgment. The rule is that a judgment upon the merits rendered in a former suit between the same parties, or their privies, in the same right, upon the same cause of action by a court of competent jurisdiction, is conclusive and an estoppel in all other ac-

tions between the same parties, or their privies. This doctrine applies also to condemnation proceedings, unless the facts and circumstances in the second suit show a greater or different necessity from that set forth in the first suit. After a careful consideration of the record in the former suit, we conclude that it does not estop the plaintiff in maintaining this one. It was sought in the former action to condemn the same land for the same purpose, and if that issue had been determined, in the absence of any change of circumstances, it would be conclusive here; but the issue was not tried, nor was it determined. By stipulation it was in effect withdrawn, and an agreement made for an easement to lay a pipe in the ground of defendant not within the descriptive calls of the land described in the complaint. No land was taken. The easement to lay the pipe was through and over different land from that described in the complaint. The plaintiff agreed to pay, and did pay, \$250 and the costs that had been incurred for the right to lay the pipe. Judgment was entered upon the stipulation evidently for the purpose of making the agreement set forth in the stipulation a matter of record. The judgment can have no greater effect than if the complaint had asked for an easement to lay a twelve-inch iron pipe over the precise location described in the judgment, and after trial the court had determined that the plaintiff was entitled to the easement as prayed for. In such case the judgment would be an estoppel as to the question of the right to lay the iron pipe in the ground of defendant as located and described in the judgment. It would not estop the plaintiff from again bringing an action to condemn different land for the purposes of a drainage ditch. The plaintiff withdrew its claim for the condemnation of the land in the first suit by reason of the stipulation. The issue was, therefore, not determined, nor could it have been determined if we regard the stipulation as a pleading authorizing a judgment for a different easement over different land. Suppose the stipulation had been to allow the plaintiff to lay an iron pipe in the ground of defendant on a different tract of land, wholly disconnected with the drainage of plaintiff's land, and judgment had been entered accordingly, could it be said that the judgment would estop the plaintiff from maintaining the present action? The issue in the present suit is as to the neces-

sity of taking the land described in the complaint for the purposes therein set forth. After the stipulation was made in the prior suit no such issue was in the case. It is not the policy of the law to estop a party from maintaining an action by reason of a prior judgment upon an entirely different issue. We have not lost sight of the fact that a judgment upon stipulation by consent of the parties is binding and valid; but it is binding only as to the matter consented to by the stipulation. The authority for the judgment in such case is the stipulation, and the judgment decides nothing except as authorized by the stipulation. The plaintiff paid for the easement it took by stipulation in the prior case. The law compels it to pay for the land condemned in the present case.

In *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, [15 Sup. Ct. Rep. 733], it appeared that in a prior action between the same parties, in which the Last Chance Mining Company was defendant, it had answered, and issue was joined as to the possession of a certain triangular part of a mining claim and the ores therefrom. The action resulted in a judgment for the plaintiff in said prior suit, and against the Last Chance Mining Company by reason of the withdrawal of its answer. The Tyler Mining Company afterward amended its application, so that it excluded the triangular piece of land included in the prior suit. The other portions of the claim of the Last Chance Mining Company, except the triangle, were not involved in the prior suit. The court held that the judgment was not an estoppel except as to the triangle, and in the opinion said: "The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter in dispute in this action. The judgment in that case is therefore not conclusive as to matters which might have been decided, but only as to matters which were in fact decided."

In *Haldeman v. United States*, 91 U. S. 584, it was held that a judgment by consent dismissing a prior suit was not a bar. The court said: "But there must be at least one trial of a right between the parties before there can be said to be an end of the dispute, and before a former judgment can avail as a bar to another suit. . . . There was neither trial, nor decision, nor averment even, that the parties had, by their agreement, adjusted the matter in controversy. . . .

But the general entry of the dismissal of a suit by agreement is no evidence of an intention to abandon the claim on which it is founded, but rather of a purpose to preserve the right to institute a new suit if it becomes necessary. It is a withdrawal of a suit upon terms. These terms may be more or less important; they may refer to costs, or they may embrace a full settlement of the contested points. If they are sufficient to estop the plaintiff the plea must show it."

Applying the reasoning of the above case to the case at bar the stipulation does not show that plaintiff agreed to abandon its right forever to condemn the land in controversy.

In *McCormick v. Gross*, 135 Cal. 304, [67 Pac. 766], it was held that in an action of replevin, the plea in abatement of a prior action pending between the same plaintiff against the same defendant to recover money alleged to be due under a contract for the price of the same property was not good. In the opinion it is said: "It is provided in section 1908 of the Code of Civil Procedure that a judgment or order in certain cases is conclusive between the parties as 'to the matter directly adjudged,' and in section 1911, 'that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.'"

In an opinion of Mr. Justice Harrison in *Oakland v. Oakland Water Front Co.*, 118 Cal. 220, [50 Pac. 300], the doctrine of estoppel by reason of a former judgment is fully discussed, and the authorities cited. It is there said: "The form of the judgment is immaterial, but unless it appear from the record that it was given upon a consideration of the merits of the controversy, or if it affirmatively appears that the merits were not considered, it is not available as an estoppel."

In *Hughes v. United States*, 4 Wall. 232, the court said: "In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties, or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground

which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

In *Foster v. The Richard Busteed*, 100 Mass. 409, [1 Am. Rep. 125], the rule is thus stated: "To be a bar to future proceedings it must appear that the former judgment necessarily involved the determination of the same fact to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit. It must also appear to have been precisely determined." (See *Freeman v. Marshal*, 137 Cal. 159, [69 Pac. 986]; *Ephraim v. Pacific Bank*, 136 Cal. 646, [69 Pac. 436]; *Freeman on Judgments*, secs. 251, 253, 256, 257, 260, 271; *Knitsinger v. Brown*, 72 Ind. 468.)

It may further be said that the complaint having alleged, and the jury having found, that the taking of the land is now necessary for the uses and purposes of plaintiff, the presumption, in the absence of evidence, is that new facts and circumstances were shown. It is claimed by the defendant that the former judgment in effect determined that it was not then necessary to take the land for the purposes of a ditch. The evidence showing that it is now necessary to take it, the burden is placed upon defendant to show, not only the prior judgment between the same parties as to the same subject matter, involving the same issue, but that there have been no new facts or circumstances to now justify the taking. Our attention has not been called to any evidence showing such fact, and we have been unable to find any in the record. On the other hand, plaintiff's witness Frost, a civil engineer, testified that in April, 1903, he found the water standing five feet deep on the land in the lagoon at a point five thousand feet above the bridge; that the natural outlet of the laguna is the creek, the bed of which should be widened, deepened and cleaned out; that the proposed plan is the only practicable plan of draining the lagoon, and the quantity of land proposed to be taken is a little over half an acre. Dodge, a civil engineer, also testified that to carry the flow of water it is necessary to excavate the ditch a distance of eight hundred and forty feet below the bridge. When asked if the pipe-line would carry off the water of the lagoon as well as the natural flow of the creek, he answered: "It won't run off at all; no natural flow of the creek. The natural flow of the creek is four feet higher than the lagoon.

The bed of the creek below the bridge has been raised several feet since I surveyed it in 1888." There is other testimony, but the above is sufficient to show the present necessity for taking the land for the public use designated in the complaint.

Defendant contends that there is no necessity for the public improvement proposed—the drainage of the lands included in the district. As before stated, it has been held that the district is a corporation created and existing under a valid act of the legislature. The board of trustees of the district employed civil engineers to survey, plan, locate and estimate the cost of the works necessary to drain the district, and determined that it was necessary to drain the district in accordance with the plans of the engineers. The determination of the board of trustees as to the necessity for draining the district is final in this case. It is not a matter that is subject to review by the courts. The plaintiff is a corporation authorized to drain and reclaim lands. A ditch or aqueduct for draining or reclaiming land has been declared by the legislature to be a public use. (Code Civ. Proc., sec. 1238, subd. 4.) It was, therefore, not necessary to prove that the drainage of the district was necessary, but only that the taking of the lands of defendant was necessary for such drainage. (*City of Pasadena v. Stimson*, 91 Cal. 238, [27 Pac. 604]; *Santa Ana v. Harlin*, 99 Cal. 539, [34 Pac. 224].) As to the necessity for taking the land, the verdict of the jury was for plaintiff, and it is sufficient to say that the evidence supports it.

It is claimed that the court erred in certain rulings as to the amount of damage to which the defendant was entitled by the severance of the land not sought to be condemned from the portion sought to be condemned. We have examined the rulings, and find nothing of sufficient importance to justify a reversal of the case. The principal claim is that defendant should have been permitted to show that the portion of its land north of the road and adjacent to the laguna receives moisture by the seepage from the laguna, and that the drainage of the laguna will damage its land by depriving it of such moisture. The evidence offered for the purpose of proving this was that of the Martins. By examining the testimony of Charles Martin we find that he testified that "the pipe as it is now constructed, in connec-

tion with the creek, drains the lagoon, and carries the water from the lagoon in time to permit of the cultivation of the lagoon." He further testified that the water has been off the lagoon sufficient to permit its cultivation by the first of May during the average for the past fifteen years. Charles E. Martin testified that the water is off the lagoon in May. "The pipe carries the water away until it is entirely dried up. There has not been a year to my knowledge when that pipe has not carried away the water, and entirely dried the lagoon." It is thus seen that when defendant claims that the condemnation is not necessary it produces evidence to show that the old pipe drained the laguna dry by the first of May, and then, on the question of damages, it offered evidence to prove that draining the laguna by the proposed system would deprive it of the seepage from the laguna during the summer months. We are of opinion that the question of damages to the parcel of land not sought to be condemned was fairly submitted to the jury on the evidence, and its finding of \$500 damage to such land is a fair deduction from the evidence.

The judgment and order are affirmed.

Hall, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 9, 1907.

[Civ. No. 331. Second Appellate District.—March 11, 1907.]

ELENA P. DE WOLFSKILL, Appellant, v. GEO. A. SMITH and DATUS E. MYERS, Respondents.

WATER RIGHTS—WATER FLOWING FROM WELLS ON ABANDONED OIL CLAIM—INEFFECTIVE DEED.—Where an oil mining claim has been abandoned by the owner, after sinking several wells thereon, without the discovery of oil, the abandoned claim reverts to its original status as part of the public domain; and a subsequent deed from the original owner, conveying all right in the land and in the wells and water therein and flowing therefrom, is ineffective to convey any interest in the land or water.

ID.—APPROPRIATION OF WATER IN STREAMS ON PUBLIC LAND—ORIGIN IMMATERIAL—PERCOLATION.—Water flowing in a stream on public land, whether from a spring, or from abandoned wells situated thereon, is subject to appropriation under section 410 of the Civil Code. The fact that the stream may be owing to the percolation of water, whether caused naturally in a flowing spring or artificially in flowing wells bored in the ground, is immaterial. The stream in each case is equally the subject of appropriation.

ID.—MODE OF APPROPRIATION—NOTICE—DILIGENT PROSECUTION OF WORK—RELATION TO NOTICE—HINDRANCE BY SETTLER.—Under the Civil Code, the posting of the notice of claim to the water does not alone constitute an appropriation, but within sixty days thereafter the construction of the means of diversion must be commenced and prosecuted diligently and uninterruptedly, and when completed the claimant's right to the use of the water relates to the time of posting the notice. But where the wells were capped by a subsequent settler on the land so as to hinder the completion of the work, said settler is in no condition to assert that the claimant had failed to prosecute the work with diligence and to become an active appropriator.

ID.—PRIORITY OF RIGHT OF WAY AGAINST SETTLERS.—Under the act of Congress of July 16, 1866, and the amendments thereto, the right of way for vested and accrued water rights and rights to ditches used in connection therewith are assured against subsequent settlers and homestead claimants.

ID.—EFFECT OF POSTING NOTICE—VESTED RIGHT.—By posting the notice of claim in a conspicuous place at each of the wells, before any settlement including the same, the claimant became vested with the right to use the stream of water flowing therefrom, together with the right to construct over and across the land the necessary ditches to convert and conduct the same to the place of intended use, as against any subsequent settlers whose claim included the same or any part thereof.

ID.—SUFFICIENT RECORD OF NOTICE—ACKNOWLEDGMENT NOT REQUIRED. Where the notice posted at each well was identical, it was only necessary to record one copy thereof, and no acknowledgment of the notice was necessary to insure its proper record. The purpose of recording is to furnish notice of claimant's rights to subsequent settlers upon the land, or subsequent appropriators of the water; and the record of a single copy of the notice is sufficient for that purpose.

ID.—RIGHT OF WAY FOR PIPE-LINE.—The fact that one of the defendants, prior to plaintiff's appropriation of the stream of water, had taken steps to obtain a right of way for a pipe-line over the land, the boundaries of which proposed right of way included the land on which the wells were located, gave him no right as against plaintiff's appropriation of the stream of water flowing therefrom.

10.—LIMIT OF VESTED WATER RIGHT—DEVELOPMENT OF ADDITIONAL WELLS NOT INCLUDED.—The vested water right belonging to the appropriator of the stream of water flowing from the existing wells, as against subsequent claimants of the land, is limited to the right to complete the construction of the ditch so as to divert such stream to the point of intended use, and does not include the right to enter upon the land for the purpose of developing water by boring additional wells.

APPEAL from a judgment of the Superior Court of Riverside County. J. S. Noyes, Judge.

The facts are stated in the opinion of the court.

Barstow & Variel, and Thomas T. Porteous, for Appellant.

John G. North, and O. P. Sanders, for Respondents.

SHAW, J.—Appeal from judgment in favor of defendants. This action involves the right to water flowing from artesian wells located upon government land.

It is based upon the following facts: Sometime during the year 1900 an oil company commenced boring for oil in a canyon in the southeast quarter of the northwest quarter of section 4, township 3 south, range 2 west, S. B. M. It continued the prosecution of its work until January, 1901, when, after having bored three wells and found no oil or other mineral substance, it abandoned the work. At the time of the commencement of said work, and up to October 20, 1902, the said land was unsurveyed land of the government, and, except as to the time that said oil company was prosecuting said work, was unoccupied. The three wells bored are in line with the bed of the canyon, distant about five hundred feet apart. The lower well has since its completion by said oil company flowed five inches of water, measured under a four-inch pressure; the second or middle well, three inches under like measurement; and from the upper well no water at all flows. On the ninth day of October, 1902, and after the oil company had abandoned all work upon the premises upon which said wells were located, it executed to the plaintiff a deed whereby, for a valuable consideration, it purported to convey to said plaintiff all its right, title and interest in and to said forty acres of land and said wells and

the water therein and flowing therefrom. That thereafter, on October 13, 1902, plaintiff posted in a conspicuous place at each of said wells a notice of appropriation, as follows:

"NOTICE OF APPROPRIATION OF WATER.

"Take notice that the undersigned claims fifteen hundred inches of water measured under a four-inch pressure flowing from and at the wells bored by the San Jacinto Oil Company on the land which would be the northwest quarter of section four, township three south, range two west, San Bernardino meridian, if said land were surveyed by the United States, and I intend to divert said water at the three several points where this notice is posted, to wit, at each of said wells bored by the San Jacinto Oil Co.

"I intend to use said water for domestic and irrigation purposes on the land which was known as the Rancho San Jacinto Nuevo and the Moreno, Lakeview and Alessandro Colonies and adjoining lands in the county of Riverside, state of California.

"I intend to divert said water by means of ditches of sufficient capacity to carry same, leading from each of said points.

"Dated the thirteenth day of October, 1902.

"ELENA P. de WOLFSKILL.

"Witness:

"DAVID G. WOLFSKILL."

That on October 16th following one copy of the above notice was filed for record in the office of the county recorder of Riverside county, but that neither of said notices or copy filed was ever acknowledged.

That on October 20, 1902, one of the defendants, George A. Smith, entered upon and took possession of the entire northwest quarter of said section as a homestead under the laws of the United States, and since said date Smith has been in possession of said premises and of the wells located thereon and the water flowing therefrom, and has fully complied with the provisions of the law relating to the acquisition of government land by settlers thereon for homesteads.

That on August 21, 1902, Datus E. Myers did, under and in accordance with a certain act of Congress, file in the proper United States land office certain documents, data and maps required by said act of Congress, whereby he located a right of way for a pipe-line one hundred feet in width and extend-

ing across and through said forty acres upon which said wells were located, and embracing within its boundary lines the land upon which all of said wells are located. That thereafter, on November 17, 1902, said Myers, under the act of Congress entitled, "An Act for the relief of Thomas B. Valentine," selected said southeast quarter of said northwest quarter, and being the forty acres upon which said wells were located, and duly filed certificate of location "E No. 20," for forty acres of land issued in accordance with said act, and said selection was allowed.

That plaintiff duly commenced the construction of the ditch required to convey the water sought to be appropriated to her land and prosecuted the work continuously until, at the instance of defendant Smith, she was enjoined from entering or working upon the northwest quarter of said section on which he had, on October 20, 1902, located his homestead.

That said defendant Smith capped the wells, fenced the land in and prevented plaintiff from doing any work on said premises, or taking or diverting any water therefrom, and claims the right so to do by virtue of this claim and occupancy of said premises as a homestead.

No issue as between defendants is involved, the sole question being the right of plaintiff as against both defendants. From a judgment in favor of defendants the plaintiff appeals.

Appellant bases her claim to the water, first, upon the deed of conveyance from the oil company; second, upon the notice of appropriation, duly followed (so far as not prevented by the acts of defendant Smith) by the statutory steps required for the actual appropriation of water subject to appropriation under the laws of this state. As against plaintiff, the defendant Myers claims the water by virtue, first, that the wells are located within the boundary lines of the right of way for the pipe-line which he located on August 21, 1902, which location was prior in date to either the alleged posting of notice of appropriation or purchase made by plaintiff; second, that his selection of the forty acres of land under the Valentine scrip entitles him to the flow of the wells as against plaintiff.

Smith's claim is by virtue of his being an actual occupant of the land under the homestead laws of the United States.

Plaintiff's claim to the wells or the water flowing therefrom, so far as such claim is based upon purchase and con-

veyance from the oil company which had bored the wells, cannot be sustained. The fact that these flowing wells resulted from a fruitless effort to discover oil gave the company no right, title or interest in the land or stream of water flowing thereon. The laws governing the location of placer claims apply with equal force to the location of oil claims. (*Miller v. Chrisman*, 140 Cal. 441, [98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444].) The oil company had acquired no right, title or interest in the land or water which it could legally convey. No attempt had been made to comply with the laws applicable to the location of an oil claim. Its rights, if it had any, to the land, wells, or water flowing therefrom, terminated when it ceased work thereon and abandoned its efforts to discover oil. Admitting that actual occupation of the land accompanied by active work thereon, in the prosecution of its efforts to discover oil, entitled the company to possession, such right terminated upon a failure to discover oil, and when, prior to October 9th, it abandoned the enterprise. (*Weed v. Snook*, 144 Cal. 439, [77 Pac. 1023]; *Miller v. Chrisman*, *supra*.)

Where a miner abandons his claim, it reverts to its original status as part of the unoccupied public domain. A subsequent locator takes it with all shafts, tunnels and drifts, however extensive or costly. (20 Ency. of Law, p. 733.)

The same principle applies to an oil claim, and it follows that inasmuch as the San Jacinto Oil Company had prior to October 9, 1902, abandoned the premises upon which the wells, one flowing five inches and one flowing three inches, were located, the land reverted to its original status as a part of the public domain. It was, on October 13, 1902, the date of posting the notice of appropriation of the water, a part of the unoccupied government land. Was this water subject to appropriation? In our opinion it was. The law is well settled that water flowing from springs upon the public lands of the United States is subject to appropriation under section 1410 of the Civil Code, which provides that "The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation." (*Ely v. Ferguson*, 91 Cal. 187, [27 Pac. 587]; *De Necochea v. Curtis*, 80 Cal. 397, [20 Pac. 563, 22 Pac. 198]; *Strait v. Brown*, 16 Nev. 317, [40 Am. Rep. 497].)

The fact that the flow of the stream from the spring is caused by water percolating through the soil does not deprive it of the character which makes it subject to appropriation. "Where percolating waters collect or are gathered in a stream running in a defined channel, no distinction exists between waters so running under the surface or upon the surface of land." (*Cross v. Kitts*, 69 Cal. 217, [58 Am. Rep. 558, 10 Pac. 409].) Water passing through the soil, not in a stream but by way of filtration, is not distinctive from the soil itself; the water forms one of its component parts. In this condition it is not the subject of appropriation. When, however, it gathers in sufficient volume, whether by percolation or otherwise, to form a running stream, it no longer partakes of the nature of the soil, but has become separate and distinct therefrom and constitutes a stream of flowing water subject to appropriation. The water in question here is the stream issuing from the wells, and it is immaterial for the purposes of this discussion whether this stream is supplied by water percolating and filtering through the earth or not; at all events, it has gathered into a stream. No distinction can be made between the water flowing from these artesian wells and that flowing from the springs. "Water rising to the surface of the earth from below and either flowing away in the form of a small stream or standing as a pool or small lake," is the definition of a spring given by the Century Dictionary. This definition is equally applicable to an artesian well. The stream in either case may result from the gathering of water at some point, whether near or distant, which produces the stream, the flow of which is by natural causes forced to the surface. In the one case the aperture or opening through which it finds its way to the surface is the result of nature's forces; in the other, it is produced by artificial means; the fact that it is produced by boring a hole in the ground in no wise changes its character. In either case the water flows to the surface naturally. When a stream of unappropriated water flows from an artesian well, having its location upon unoccupied government land, it is the subject of appropriation to the same extent as the waters of a natural spring likewise located.

Posting the notice of claim to the water does not constitute an appropriation. The Civil Code, section 1416, provides that within sixty days the claimant must commence the con-

struction of the works in which he intends to divert the water and must prosecute the work diligently and uninterruptedly. And section 1418, Civil Code, provides that by a compliance with the rules contained in section 1416, the claimant's right to the use of the water relates back to the time the notice was posted. His right to the water depends upon his complying with the provisions of the law and making an actual appropriation of its use. The court finds that the claimant did commence the work within sixty days after posting the notice and prosecuted it continuously until enjoined therefrom at the instance of defendant Smith on December 10, 1902, after Smith had settled upon the land, and that Smith fenced the land and prevented her from constructing the ditch. Having capped the wells and enjoined appellant from entering upon the land to complete the ditch, by means of which she sought to divert the water to the place of intended use, respondents are in no position to assert that appellant has failed to prosecute the work with diligence and become an actual appropriator.

By act of Congress passed July 16, 1866, [14 Stats. at Large, 253], it is provided: "That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other useful purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, *and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed.*" (U. S. Rev. Stats., sec. 2339, [U. S. Comp. Stats. 1901, p. 1437].)

Later this act was amended by a provision to the effect that all homesteads allowed should be subject to vested and accrued water rights and rights to ditches used in connection therewith.

By posting the notice appellant from that time became vested with the right to the use of the stream of water then flowing from these wells, together with the right to construct over and across the land the necessary ditches to divert and conduct the same to the place of intended use. Both Myers and Smith took the property subject to the rights of appellant to the stream of water then flowing thereon, together with the right, without interference, to construct the neces-

sary ditches for its diversion, which rights accrued and became vested in her under the said acts of Congress and the laws and decisions of this state. The language used in *Taylor v. Abbott*, 103 Cal. 421, [37 Pac. 408], where it is said that the above-quoted section "does not confer the right to enter upon lands in the possession of another for the purpose of securing the water thereon, or of completing an attempted diversion of water," is not applicable to this case, for the reason that in that case no sufficient notice had been posted, and therefore no right to the water had accrued or become vested under the local laws and decisions of the courts.

The notice was posted in a conspicuous place at each well, and the claim is for fifteen hundred inches of water "flowing from and at the wells." It appears that these wells are in line with the bed of the canyon, and the lower one about five hundred feet distant from the one next above, or middle one, and that no water flows from the upper one. Under these facts we regard the notice as a sufficient designation of the point of diversion, as well as sufficient in substance to meet the requirements of section 1415, Civil Code. Nor was it necessary, the notices being identically the same, to record more than one copy. The purpose of recording is to furnish notice of claimant's rights to subsequent settlers upon the land or appropriators of the water, and this object was fully attained by recording one copy.

The fact that defendant Myers had, prior to the posting of the notice of appropriation, taken steps to obtain a right of way for a pipe-line over the land, the boundaries of which proposed right of way included the land on which the wells were located, gave him, as against appellant, no right to the stream of water flowing therefrom.

It is finally urged in support of the judgment that the copy of the notice recorded was not acknowledged, and therefore not entitled to be recorded, and if recorded, did not constitute constructive notice of appellant's claim to the water, or impart any notice to defendants.

Section 1161 of the Civil Code provides that, "before an instrument can be recorded, unless it belongs to the class provided for in either sections 1159, 1160, 1202, or 1203, its execution must be acknowledged." Copies of notices of appropriation of water are not designated in the excepted classes mentioned in said sections. The copy of such no-

tice required to be recorded by section 1415, Civil Code, is not, in our judgment, such an instrument the execution of which is required to be acknowledged as a condition of being recorded, within the meaning of section 1161 above quoted. "The word 'instrument,' as used in the codes, invariably means some written paper or instrument signed and delivered by one person to another, transferring the title to or giving a lien on property, or giving a right to a debt or duty." (*Hoag v. Howard*, 55 Cal. 564.) This language was used in holding that a writ of attachment was not an "instrument" within the meaning of the statute; but it is cited with approval in *Warnock v. Harlow*, 96 Cal. 298, [31 Am. St. Rep. 209, 31 Pac. 166], where it is held that a notice of *lis pendens* is not an instrument, yet provision is made for recording such notice of an action affecting the title to real estate. (Code Civ. Proc., sec. 409. And also in *Foorman v. Wallace*, 75 Cal. 555, [17 Pac. 680].)

Rapalje defines an acknowledgment to be: "The act of one by whom a deed has been executed, in declaring before a competent court or officer that it is his act and deed." Section 1415, Civil Code, does not require the notice which is posted, and which presumably is signed by the claimant, to be recorded, but a *copy* thereof, not necessarily signed by the party claiming the water. It may be made and filed by a stranger. Inasmuch as the copy of the notice is required to be recorded, and as this copy is not required to be made or filed by the claimant, it seems clear that the legislature did not contemplate that it should be acknowledged in order to be recorded.

The northerly or upper well supplies no stream of running water, and hence affords no water subject to appropriation. Nor do the facts entitle appellant to enter the land for the purpose of developing water by boring additional wells, but she has an accrued and vested right to prosecute her work under and in accordance with the provisions of section 1416 of the Civil Code in the construction of the necessary ditches to convey the stream of water flowing from the two southerly wells to the place of intended use, and do all things necessary to complete the actual appropriation of the stream of water, in accordance with the notice posted on October 13, 1902.

The judgment is reversed, and the trial court will render a judgment for appellant in accordance with the views herein expressed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 886. First Appellate District.—March 12, 1907.]

GEORGE K. FORD, Respondent, v. W. M. CANNON et al.,
Defendants; FRANK FREEMAN et al., Appellants.

**ORDER APPOINTING RECEIVER—APPEAL—FAILURE TO SERVE NOTICE UPON
“ADVERSE PARTY”**—**DISMISSAL**.—In an action by the plaintiff to enforce an agreement in relation to a trust fund in which plaintiff and defendants were beneficiaries, in which a receiver of the fund was appointed, upon appeal by part of the defendants from the order appointing the receiver, a codefendant, who was a party to the order, and whose interest in the fund will be affected by the reversal or modification of the order, is an “adverse party” who must be served with the notice of appeal, and for failure to serve him therewith the appeal must be dismissed.

MOTION to dismiss an appeal from an order of the Superior Court of the City and County of San Francisco appointing a receiver. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

F. H. Gould, for Appellants.

Stanley Moore, L. A. Gibbons, and George K. Ford, for Respondent.

BURNETT, J.—The action is based upon an alleged trust agreement. By the complaint it appears that one of the defendants, Samuel C. Pierce, had a cause of action for damages against the Mountain Copper Company. He entered into an agreement with plaintiff, who is an attorney at law, whereby the latter was to furnish all the money necessary for the prosecution of said cause of action and also to act

as the attorney of the former in whatever proceeding was required, and it was agreed that Ford should receive for such services one-half of the amount recovered by suit, compromise or otherwise. Thereafter plaintiff entered into an agreement with Freeman, Cannon and one Charles L. Donohoe, whereby the last three were to perform said services and pay all the costs, and the four, after deducting the costs, were to share equally the amount received, to wit, one-half of what was recovered. It was further agreed that defendants, Freeman and Donohoe, should secure from Pierce a new contract in pursuance of said arrangement. Accordingly, Pierce and Freeman entered into a written contract whereby Freeman was to represent him in the litigation, advancing all the costs and receiving for his services one-half of what should be recovered. Freeman agreed with plaintiff and defendants Cannon and Donohoe, that he would receive said money in trust and the four would share it equally. Suit was brought on behalf of Pierce and he recovered the sum of \$15,000. The judgment was assigned to Freeman, who received it in trust for the parties named—Ford, Cannon, Freeman and Donohoe. The money was afterward paid to Freeman and Donohoe, who hold the greater portion of it in trust for plaintiff and defendants. Defendants Freeman, Donohoe and Cannon each advanced certain costs and expenses in said action. Plaintiff demanded of them that they account to plaintiff for the moneys they and each of them received and paid out, but they refused to do so. There is also an allegation of the insolvency of Freeman and Donohoe. Plaintiff made application to have a receiver appointed “to take charge of the money or fund in the complaint in said cause described, during the pendency of this action . . . on the ground that the money or fund described in the complaint herein is liable to be lost, removed or materially injured.” The application was heard upon the verified complaint and the affidavit of defendant Donohoe denying all the material allegations of the complaint. Defendant Cannon appeared upon the hearing of said motion and also requested the appointment of a receiver. It was contested by the other defendants, who have appealed from an order which was made appointing a receiver.

Cannon has moved to dismiss the appeal on the ground that no service was made upon him of the notice of appeal, of

the transcript or of the appellants' points and authorities. It is admitted that he was not served, but it is claimed that he is not "an adverse party" within the meaning of section 940, Code of Civil Procedure, which provides that the notice of the appeal must be served "on the adverse party or his attorney." There can be no doubt that Cannon was a party to the proceeding. He was expressly made a defendant in the action and the notice of the motion for the appointment of a receiver was addressed to all the defendants and he appeared and participated in the hearing. It must be manifest that he is a party in the legal sense, which means that he has been made and become such in a mode prescribed by law, so that he is bound by the proceedings. (*Robinson v. Vanderberg Co.*, 37 Ind. 335; *Baskett v. Hassell*, 107 U. S. 608, [2 Sup. Ct. Rep. 415].) Whether he is an "adverse" party must be determined by an examination of the complaint and the proceedings culminating in the appointment of the receiver. "Whether a party to the action is adverse to the appellant must be determined by their relative positions on the record and the averments in their pleadings, rather than from the manner in which they may manifest their wishes at the trial, or from any presumption to be drawn from their relation to each other or to the subject matter of the action in matters outside of the action." (*Harper v. Hildreth*, 99 Cal. 268, [33 Pac. 1103].) As to the meaning of the term "adverse" used in this connection there can be little doubt. In *Senter v. De Bernal*, 38 Cal. 640, it was declared:

"Every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party' within the meaning of these provisions of the code, irrespective of the question whether he appears upon the face of the record in the attitude of *plaintiff* or *defendant* or *intervener*. . . . Our code allows any and every party who is aggrieved to appeal without joining anyone else, no matter what may be the character of the judgment against him, whether joint or several; and, in this respect, works a change from the former practice, but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formally appeared in the action in

the court below, or his appeal, as to those not served, will prove ineffectual, and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former also."

To the same effect are *Randall v. Hunter*, 69 Cal. 80, [10 Pac. 130]; *Milliken v. Houghton*, 75 Cal. 539, [17 Pac. 641]; *In re Castle Dome Min. etc. Co.*, 79 Cal. 246, [21 Pac. 746]; *Lancaster v. Maxwell*, 103 Cal. 67, [36 Pac. 951]; *Barnhardt v. Edwards*, 111 Cal. 428, [44 Pac. 160]; *Vincent v. Collins*, 122 Cal. 387, [55 Pac. 129].

The appointment of a receiver is a matter in which defendant Cannon was interested equally with plaintiff. He was one of the beneficiaries of the trust fund which the receiver was authorized and directed to take into his possession and control. The reversal of the order appointing the receiver would affect his interest in the same manner as it would that of plaintiff. If Cannon is not an adverse party, there is no adverse party shown by the record. It seems to me, in view of the decisions, that the question is scarcely open to serious controversy.

There is no doubt that the matter is jurisdictional, and while it is not clear that it was a proper case for the appointment of a receiver, we are precluded from considering that question in this proceeding.

The appeal is dismissed.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 324. First Appellate District.—March 14, 1907.]

In the Matter of the Estate of JOHN FAY, Deceased.
MARY J. SCOTT et al., Appellants, v. JOHN FAY and
LUKE FAY, Respondents.

ESTATES OF DECEASED PERSONS—INVALID TRUST UNDER WILL—SUSPENSION OF POWER OF ALIENATION—TITLE OF HEIRS.—A trust under the will of a deceased person providing for an absolute continuance thereof for the period of twenty-five years may by possibility suspend the power of alienation beyond lives in being, and is invalid and void under sections 715 and 716 of the Civil Code; and the title became vested in the heirs of the deceased testator.

ID.—DISTRIBUTION—CONVEYANCE BY WIDOW TO SON.—Where the deceased left surviving him his wife and two sons, and the widow, during administration, conveyed all of her interest in the estate to one of the sons, her interest in the estate vested in him, regardless of whether the property was community property or separate property, and the estate was properly distributed to the two sons, according to their respective interests in the estate.

APPEAL from a decree of the Superior Court of the City and County of San Francisco, distributing the estate of a deceased person, and from an order denying a new trial. **J. V. Coffey**, Judge.

The facts are stated in the opinion of the court.

Louis S. Beedy, and **J. F. Bowie**, for Appellants.

James G. Maguire, for Respondents.

COOPER, P. J.—Appeal from decree of final distribution, and from an order denying appellants' motion for a new trial.

The will of deceased was duly admitted to probate and bears date, "May twenty-fifth, eighteen hundred and fifty-nine." It contains the following clause:

"I will all my separate property and all my share of the community property of every description, name and nature both real and personal, to my brother, David Fay, and my son, John Fay, in trust for the benefit of my three children, Luke Fay, Mary Montealegre and John Fay.

"The said David Fay and John Fay, or either of them, to hold and manage said property for the space of twenty-five years from this date; they shall keep the property in repair, pay all expenses, and divide the income from said property monthly or quarterly between my children, Luke, May and John, or their children, if they should have any; if either of my children should die without lawful children of their body, then the survivor shall inherit their share; should all of my children die before the expiration of this trust without lawful children it is my wish that my sister, Mary J. Scott, or her children should inherit or have all of my share of the estate, David Fay or my son, John Fay, will act or manage the property without giving bonds."

The court below found that Mary Montalgre (the only daughter of said deceased) died without lineal descendants prior to the death of deceased; that the provisions of the will above quoted are invalid, and the trust thereby attempted to be created is void, for the reason that the absolute power of alienation of the property therein mentioned is thereby suspended for a longer period than during the continuance of the lives of persons in being at the creation of such limitation or condition, or at the death of said testator, capable of taking the same under said provisions, and for the reason that there were and are no persons in being by whom an absolute interest in possession can be conveyed; that the period of the said trust expired and ceased prior to the death of the testator, and that said trust clause is void for uncertainty.

The deceased left surviving him his wife and two sons, Luke Fay and John Fay, his only children. After the death of deceased Bridget M. Fay, his widow, and the mother of Luke Fay and John Fay, conveyed all her title and interest in the estate to John Fay, and such conveyance was made pending the administration and prior to the decree of distribution. The property was distributed to the two sons, Luke Fay and John Fay.

The contestants are Mary J. Scott, the sister of deceased, and her children, being the sister and her children named in the said trust clause of the will.

The main question in the case is as to the validity of the trust clause, and if the clause is void the decree should be affirmed. We are of opinion that the court correctly held the trust clause void. It provides for an absolute period of twenty-five years for its continuance, during which time the power of alienation is suspended. The testator had three children, who were in being at the time he made the will, and he had the right to suspend the power of alienation during the continuance of their lives, but he did not limit or suspend the power of alienation during their lives only. He suspended it for twenty-five years. If they should all die before the expiration of the twenty-five years, he suspended the power of alienation still for twenty-five years. He directed the income to be paid to "their children if they should have any." Our code expressly provides that the power of alienation cannot be suspended by any limitation or con-

dition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition. That every future interest is void in its creation which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in the chapter on alienation. (Civ. Code, secs. 715, 716.)

The court has often discussed and upheld these sections, and it is only necessary to cite two of the leading cases—*In re Walkert*, 108 Cal. 627, [49 Am. St. Rep. 97, 41 Pac. 772]; *Estate of Fair*, 132 Cal. 523, [84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000].

In view of what has been said the findings as to whether or not the property was community property, and the rulings in relation thereto, become immaterial. Whether the property was all community property, or all separate property, it vested in the widow of the deceased and his two sons. The widow having conveyed her portion to John Fay, the decree of distribution properly distributed that to him.

The decree and order are affirmed.

Kerrigan, J., and Hall, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 11, 1907, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 13, 1907.

[Civ. No. 814. Second Appellate District.—March 15, 1907.]

CHARLES CALLOWAY, Respondent, v. ORO MINING CO. et al., Defendants; FLORENCE A. STOUGH, Appellant.

ACTION FOR SERVICES—PLEADING—PROMISE OF HUSBAND AND WIFE—AMENDMENT—PROMISE OF WIFE—CAUSE OF ACTION NOT CHANGED—STATUTE OF LIMITATIONS.—In an action for services, where the original complaint alleged a promise by husband and wife to pay for services rendered on mining property owned by the wife, an amendment made more than two years after the promise, omitting the husband as a party and alleging only a promise by the wife,

does not show a change of the cause of action against her nor disclose a bar of the statute of limitations, which runs only to the filing of the original complaint, to which the amendment relates.

ID.—ORIGINAL SERVICES TO INSOLVENT CORPORATION—NEW EMPLOYMENT BY WIFE—ORIGINAL PROMISE—ASSIGNMENT OF CLAIMS—FINDING—INSUFFICIENT PROOF.—Where the services of workmen on the mine were originally rendered to a corporation which became insolvent, and which was in possession under an executory contract with the owner, who, to prevent threatened proceedings against the corporation and its stockholders made an original promise that if they would continue to work the mine, she would pay them when she regained possession, their continuance in work became a new employment by her; and an alleged assignment of the claims of the workmen against her to the plaintiff, and a finding thereof is not supported by proof of an assignment of claims by them against the corporation, in the absence of proof of any assignment, oral or otherwise, of their claims against the owner.

ID.—JURISDICTION OF SUIT—SERVICES OF PLAINTIFF—AMOUNT CLAIMED. The jurisdiction of the suit, notwithstanding the absence of proof of the alleged assignment, is not determined by the amount of the services of the plaintiff but by the whole amount claimed in the complaint.

APPEAL from an order of the Superior Court of San Diego County denying a new trial. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

C. H. Rippey, and A. Haines, for Appellant.

F. P. Willard, for Respondent.

ALLEN, P. J.—Action for personal services of plaintiff and assignors. Judgment for plaintiff; new trial denied. Appeal by Florence A. Stough, one of the defendants, from the order denying a new trial.

It appears from the record that Mrs. Stough, the appellant, on July 16, 1902, was the owner of mining property in San Diego county which was subject to an executory contract of sale, under which the Oro Mining Company, a corporation, was in possession. Plaintiff and three others were engaged in work on the mine for the corporation, and becoming dissatisfied by reason of default in the payment of their wages, determined to quit work and to institute proceedings to collect their unpaid wages. Mrs. Stough, being

informed of this threatened action upon the part of the employees, authorized one Mullins, a stockholder in the corporation, to agree with the workmen that if they would continue at work and keep the mine free from water, she would pay them their wages when she obtained possession of the mine. This promise and proposition Mullins communicated to the men and they continued at work on the mine until November 7, 1902, at which date the appellant obtained possession of the mine. She, however, refused payment and the workmen all made out an account, which upon its face was a statement of wages due from the Oro Mining Company, a corporation, claimed to have been earned between April and December, 1902, being the aggregate of the wages due from the corporation before the agreement of appellant and that earned by them after such agreement. These statements of account all of the workmen, except plaintiff, assigned to plaintiff, who thereupon brought this action against the corporation, Mrs. Stough, her husband, and certain stockholders in the corporation.

In the original complaint it was averred that the promise to pay for the labor after July was made by Mr. and Mrs. Stough. More than two years after the maturity of the claim, the complaint was amended by an allegation that the contract was with Mrs. Stough alone. Appellant makes the point that this amendment changed the cause of action, and that more than two years having intervened between the maturity of the claim and the filing of the amended complaint, the statute of limitations barred recovery. The action, however, was upon the obligation which was sought to be enforced, and which, under the original complaint, was a joint and several obligation. There was no change in the cause of action by the filing of the amended complaint, the effect of which was to dismiss the action as against one of the defendants. The time to which the statute of limitations runs is the filing of the original complaint. (*Frost v. Witter*, 132 Cal. 425, [84 Am. St. Rep. 53, 64 Pac. 705].)

The evidence is ample to support every finding of the court, except that relating to the assignment to plaintiff by the other workmen of their claims. The allegations of the complaint, which are supported by the evidence, show that the contract between the workmen and Mrs. Stough, made by her agent Mullins, was an independent, original promise upon her part,

disconnected from any obligation or prior employment of the corporation. From the time it was made until November 7th the men engaged in work were in the employ of Mrs. Stough. Whatever claim they had was one against her individually, and, under the allegations of the amended complaint, against her alone. The complaint averred an assignment in writing by the other workmen to plaintiff of their claims against Mrs. Stough. The court so finds; but there is no evidence in the record to support such finding. On the contrary, the only assignment offered in evidence was the assignment of a claim against the corporation and for services rendered such corporation during the time the men were in the employ of appellant. The assignment was a fact at issue and the proof thereof as essential as that of the indebtedness. (*Brown v. Curtis*, 128 Cal. 196, [60 Pac. 773].)

The finding that the claim against Mrs. Stough was assigned in writing to the plaintiff before the commencement of the action has no support in the evidence; nor is there any evidence of an oral assignment. The fact that the parties who were claimed to be plaintiff's assignors were witnesses upon the trial and testified to the genuineness of their signatures upon the assignment claimed against the corporation does not tend to prove any assignment of their claim against appellant.

It is claimed by appellant further that the evidence not warranting a judgment upon the assigned claims, the court was without jurisdiction to render judgment upon the original claim of plaintiff in that the same was in amount less than \$300. This cannot be maintained. The amount of the claim in the complaint is determinative of the question of jurisdiction, and that exceeded the \$300. While it is within the power of this court to modify the judgment by affirming the same to the extent of the original claim, we are impressed from an examination of the record with the fact that there is a strong probability that evidence of an assignment may be supplied upon another trial, and that it is in the furtherance of justice that another trial of the action be had.

It is therefore ordered that the order denying a new trial is reversed, and the cause remanded for further proceedings.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 216. Third Appellate District.—March 16, 1907.]

ANNA THOMPSON, Respondent, v. C. M. WHEELER, Appellant.

ORDER GRANTING NEW TRIAL—REVIEW UPON APPEAL—INSUFFICIENT RECORD—PRESUMPTION.—Upon appeal from an order granting a new trial, the appellant must present a record which affirmatively shows error in the granting of the motion. In the absence of a bill of exceptions showing the grounds of the motion and what was used upon the motion, where the record does not establish the contrary, it will be conclusively presumed in favor of the order that it was in part based upon some ground upon which affidavits could be used, and that such were used, and were sufficient to justify the order.

STATEMENT ON MOTION FOR NEW TRIAL.—A statement on motion for a new trial which may be sufficient on appeal from an order denying the motion may be wholly insufficient to show error in the granting of the motion. It is the duty of the party who would show such error to see that the record establishes it.

APPEAL from an order of the Superior Court of San Joaquin County, granting a new trial. W. B. Nutter, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

Ashley & Neuhauser, for Respondent.

BURNETT, J.—Defendant had judgment, but the trial court granted plaintiff's motion for a new trial. From this order the appeal was taken.

The record does not show what evidence was used upon the motion for a new trial, nor upon what ground the court based its order. The notice of motion is not disclosed. In reference to the matter all that the transcript reveals is: "Whereupon, within the time by law prescribed therefor, plaintiff filed with the Clerk of said Court and served upon defendant, notice of her intention to move said Court to vacate said decision and to grant plaintiff a new trial of said action"; and: "The Court this day made an order that plaintiff's mo-

tion to vacate and set aside the decision rendered in said action, heretofore argued and submitted, be and the same is hereby granted, to which order the defendant duly excepted."

In *Skinner v. Horn*, 144 Cal. 280, [77 Pac. 905], the supreme court, speaking through Mr. Justice Angellotti, said: "The presumption is that the order granting a new trial was properly made, and, in the absence of a bill of exceptions showing what was used on the motion, unless the record on appeal establishes the contrary, it will be conclusively presumed in favor of the order that the motion was in part based upon some ground upon which affidavits could be used, that affidavits were in fact used on the hearing, and also that such affidavits were sufficient to justify the court in the making of the order appealed from. If, therefore, the appellant fails to present a record which shows affirmatively that the lower court erred in granting a new trial, such failure will operate solely to his own disadvantage."

In the same case, reported in *Skinner v. Horn*, 146 Cal. 62, [79 Pac. 597], in the opinion by the chief justice referring to the previous order of the supreme court denying the motion to amend the record, is found the following declaration: "We held that a party appealing from an order must bring up a record demonstrating conclusively that the lower court erred in its ruling or must fail in his appeal, and that an order granting a new trial must be affirmed when the record contains nothing but a statement on motion for a new trial, and fails to show that the motion was not based also upon one or more of the grounds which require affidavits for their support. . . . *Non constat*, therefore, that the order granting a new trial was not supported by affidavits disclosing newly discovered evidence, or some other of the first four grounds for the motion. (Code Civ. Proc., sec. 657.)" The foregoing is decisive of this appeal.

Appellant's answer to this contention is that "as the bill was prepared by her, the point, if well taken, would seem to be an attempt to take advantage of her own wrong." It is obvious, however, that it is not a question of morals, but of legal procedure. Besides, the present record might be sufficient to answer plaintiff's purpose if her motion had been denied, but it is not sufficient to show error of the court in granting the motion. And it is hardly to be expected that

one litigant will be solicitous to perfect the record for the special benefit of his adversary.

The order is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 257. Third Appellate District.—March 16, 1907.]

**JOSEPH SCHWIND, Respondent, v. FLORISTON PULP
AND PAPER COMPANY, Appellant.**

ACTION FOR DEATH—NEGLIGENCE OF FELLOW-SERVANT.—An employee is not liable for a death caused by the negligence of a fellow-servant of the deceased, employed in the same general business by the same employer, where there was no negligence of the employer in employing such fellow-servant, and no remissness in the conduct of the employer toward the deceased.

Id.—CONTRIBUTORY NEGLIGENCE OF DECEASED—WALKING BETWEEN CARS LIABLE TO BE MOVED—LACK OF ORDINARY CARE.—The deceased was guilty of contributory negligence in attempting to cross a railroad track between the cars of a train which were liable to be moved at any time, without taking any precaution to avoid the injury, which he might have avoided by the use of ordinary care.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Van Ness & Redman, for Appellant.

D. W. Burchard, and G. W. Schell, for Respondent.

BURNETT, J.—The action is for damages brought by respondent for the death of his minor son.

The complaint alleges that "on July 31, 1901, the said Joseph Schwind, minor son of the plaintiff herein, was in the employ of the defendant corporation in the electrical department thereof. That on said day, and at the times

hereinafter mentioned, and for a long time prior thereto, the defendant operated and maintained a railroad track that was situated and placed parallel to, and a short distance from, the factory building owned and operated by it at Floriston. That upon said track, as aforesaid, the defendant, at all of said times hereinbefore mentioned, operated cars propelled by steam for the purpose of transmitting and carrying freight to and from said factory. That near the center of said factory and fronting, adjacent to said railroad tracks, as aforesaid, a door was placed and maintained by the defendant, through and by which employees and those having occasion to go to said factory gained admission thereto and exit therefrom. That a pathway existed leading from said entrance across the track at right angles to the public highways of said town of Floriston, which said pathway during all of said times was used with the full knowledge, consent, and direction of the defendant, its officers and agents. In the manipulation of the said railroad it was the habit and custom of the defendant to so adjust its freight-cars as to keep said pathway space open in order to enable the said path to be traveled. That on the thirty-first day of July, 1901, and about the hour of 4:30 o'clock P. M. of said day, and while the said Joseph Schwind, minor child of this plaintiff, was so employed by the defendant corporation, a superintendent directed the said Joseph Schwind to go on an errand, which necessitated and required that the said Schwind should leave said building, cross said track, and go to another part of the said town of Floriston. That when the said Joseph Schwind, in pursuance of such direction, stepped out of the door of said factory, there was a freight train standing on said track, broken, so as to leave two box-cars about four feet apart at the ends, in such a manner as to leave said pathway open for purposes aforesaid. That it was the custom and habit of said defendant at all said times to have said passage kept open and free in said manner as herein stated. That while the said Joseph Schwind, pursuant to said directions as aforesaid, was walking along the said trail and passageway, and at the moment that he was crossing between said cars so left open, the defendant negligently and without warning caused said cars to collide, and thereby to mangle and kill the said Joseph Schwind. That the said Joseph Schwind was not guilty of any act that contributed

to said injury. That the servants and employees of defendant in charge of said train caused to be precipitated against one of the box-cars a freight-car that was not in charge of any brakeman, or other person, nor attached to any engine that could control the same, and no signal of any character was given to the said Joseph Schwind of the approach of said car, in order to enable him to protect himself or escape from said injury."

In the answer there is a specific denial of the foregoing allegations except as to the ownership and use of the railroad and the employment of the said Joseph Schwind, as to the existence of the door as alleged in the complaint, as to the allegation in regard to the freight train standing on the track, and as to the train not being attached to any engine, but it was denied that the ends of the cars were more than two feet apart. The answer also alleges "the fact to be that the said minor attempted to pass between the ends of said cars knowing that the same might at any moment be brought together, and that, as was the fact and as he well knew, it was not necessary for him to cross said track between said cars; and knowing also, as was the fact, that at other places said track could be crossed where there were no cars and where said track could be crossed without any danger whatever"; and furthermore, that "if the injury to and death of said minor was due to any negligence other than his own, it was the negligence of a person or persons employed by defendant in the same general business with said minor."

Counsel do not entirely agree in their statements of what was shown at the trial, but the evidence must be viewed, undoubtedly, in the most favorable light to sustain the verdict of the jury. The following statement of facts is deemed sufficient for the purposes of this opinion: The operation of the sidetracks or switches is entirely under the control of the appellant. The location of the works is in a sort of a flat, with precipitous mountains on each side, and the hotel and residence portions of the town are on one side of the tracks, and the works of the company are on the other or Truckee river side. All the operatives and employees live across the tracks from the mill, and in order to go to and from their work it is necessary for them to cross the line of the Central Pacific and the main switch. It was the custom of the company when cars were standing on the switch to leave an open

space varying from three to ten feet on the line of a trail that reached from the works across the two tracks and up the mountain near the homes of the employees. Respondent contends that "a pair of stairs had been placed by the company on the precipitous bank of the track of the Central Pacific to enable the employees to cross said track, and this open space left between the cars was in apposition to such stairway." Appellant, however, declares that this was placed there by Hirschler, the yard foreman, of his own accord, and that the company "provided for the women a board walk with a hand-rail upon it near the finishing room, where the women were employed, and for the men a trail leading down the embankment between the Truckee switch and the boiler-house, and connecting at its upper end with a wooden bridge, from which a path ran up to the cottages on the hillside." However, this difference seems immaterial, and at any rate the employees generally in going to and coming from work used the trail and steps as claimed by respondent, and their use of the same must have been known and acquiesced in by the company. The course, by any other route, was more lengthy and circuitous. The duties of young Schwind called him to different portions of the lands of the company at irregular hours in the performance of his duty, although there is no evidence how he happened to be crossing the switch at the time of the accident, nor where he was going nor by whom, if anyone, he was sent. The allegation of the complaint in that regard is unsupported, but this circumstance is of no consequence, as it is apparent that he was not a trespasser. On the day he was killed there is evidence that the cars were in their usual position at the noon hour and that the employees, including young Schwind, going to and from lunch, passed between two box-cars as customary; and that in the afternoon, probably about 3 o'clock, in attempting to pass between them again going toward the town, young Schwind was caught and killed. The freight-cars were precipitated upon him without any warning or signal indicating their approach. There is a downgrade of about thirty-one feet in fifteen hundred feet, the distance from the Floriston end of the switch to the crossing where young Schwind was killed. An employee of appellant, one Hirschler, who had charge and management of the cars, undertook to let down six empty box-cars from the

Truckee end of the switch immediately before the accident; no one was assisting him and the cars came together with such force as to drive the train on both sides of the crossing together and impelling the cars on the opposite side of the crossing some distance. There was no engine used, as one was not needed, the practice being to let down by gravity the empty cars and to send the engine down after they were loaded. Respondent claims that there were not enough men to hold the cars in check, and that appellant knew it was the custom and habit of Hirschler to attempt to let said cars down alone, and did not require him to use an adequate number of men to protect the lives of the employees. All the evidence, however, shows that Hirschler had under his direction quite a number whom he could have summoned to his assistance, but the truth is, Hirschler needed no assistance. It was an easy task to let down the cars, and he had always accomplished it without any difficulty. In fact, he had managed a much larger number without assistance. There was no negligence exhibited in letting down the cars. It was necessary that they should come with some force in order to couple them with the cars below. If there was the omission of any duty in that behalf it was in the failure to give notice or warning of the approach of the cars, but before bringing the cars down Hirschler sent "Norton to the head end to look out and see that nobody would get on the track." At the time of the accident Norton was standing on a car below the crossing, but he was leaning over the brakes and did not see young Schwind. Hirschler had left the box-car on which he was standing and was running down to see that the coupling was made, and was within five or six feet of Schwind when the latter was struck. It is obvious that if the company was under legal obligation to give warning at the crossing of the approach of the cars it furnished the men to do it. There were two men, Norton and a helper, who were in charge of the cars below; either might have stationed himself so as to command a view of the crossing, and thereby have given warning to Schwind of the approach of the cars. Even Hirschler could have run down to the crossing in advance of his cars, if the view was interrupted, to caution the deceased. But these men were all fellow-employees of the deceased, and their negligence or the negligence of any one of them cannot be imputed to appellant. There could be no

question about Norton and his helper. Respondent, however, somewhat mildly questions the proposition as applicable to Hirschler. The learned judge of the court below, though, instructed the jury that "under the law an employer is not responsible for the injuries or death of an employee caused solely by the negligence or carelessness of a fellow-employee. You are instructed that the deceased, Joseph Schwind, and Hirschler, defendant's yard foreman, were fellow-employees; and if you find from the evidence that the death of said Schwind was caused by the negligence or carelessness of Hirschler alone your verdict must be for the defendant." This seems to be in line with the decisions. In *Cosgrove v. Southern Pacific R. R. Co.*, 88 Cal. 360, [26 Pac. 175], it was held that a brakeman and conductor were coemployees of defendant. In the discussion it is said: "It is also clear that the death was caused by the negligence and breach of duty of the conductor in starting the train before schedule time. There is no averment that the defendant was negligent in the selection of the conductor." (And it may be remarked that no similar claim is made here.) "And the general rule (whatever exceptions there may be to it) is well settled in England and the United States, and particularly in this state, that a master is not liable to his servant for damages sustained by the negligent act of a fellow-servant, unless the master was negligent in the selection of the servant at fault."

In *Trewatha v. Buchanan etc. Co.*, 96 Cal. 494, [28 Pac. 571, 31 Pac. 561], it is stated in the syllabus that "an engineer employed to operate an engine and hoisting tackle, used upon and in connection with the main shaft of the mine, to hoist the rock and debris therefrom, and to raise and lower the miners, is a fellow-servant with a workman in the mine."

In *Daves v. Southern Pacific Co.*, 98 Cal. 19, [32 Pac. 646], it is stated that "the law recognizes no distinction growing out of the grades of employment of the respective employees, nor does it give effect to the circumstance that the fellow-servant, through whose negligence the injury was received, was the superior of the plaintiff in the general service in which they were both employed."

In *Stevens v. San Francisco etc. R. R. Co.*, 100 Cal. 555, [35 Pac. 165], it is held that "a fireman and oiler and an

engineer of a ferry-boat are fellow-servants employed 'in the same general business,' and the fact that the engineer employs and discharges the fireman and oilers does not alter the relation."

In *Livingston v. Kodiak Packing Co.*, 103 Cal. 258, [37 Pac. 149], a mate of a vessel and a servant employed in the steward's department are declared to be fellow-servants.

In *Donovan v. Ferris*, 128 Cal. 48, [79 Am. St. Rep. 25, 60 Pac. 519], it is held that "it is not the duty of a master to give personal warning of danger to persons employed in the business of blasting, and the employment of a competent servant to give them needed warning ends the responsibility of the master. Such a competent servant is not a vice-principal but a fellow-servant of those to be warned by him."

The cases of *Brown v. Sennett*, 68 Cal. 225, [58 Am. Rep. 8, 9 Pac. 74], *Becson v. Green Mountain Min. Co.*, 57 Cal. 20, and *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, [6 Sup. Ct. Rep. 590], are cited by respondents to the contrary. The facts in those cases distinguish them from the case at bar, and besides, the first two have been modified and virtually overruled, and the decision of the United States supreme court has been shown to be inapplicable in this state by the *Cosgrove* case, *supra*. It cannot be doubted that deceased and Hirschler were "employed by the same employer in the same general business," as provided by section 1970, Civil Code, and the negligence of either toward the other could not be charged against the company. The "general business" of the company was the manufacture and sale of paper, and both contributed to the promotion of that business. It is of no consequence that they were engaged in different departments or that the grades of their employment were not the same. Neither had any control of the other nor could it be said that one represented the company in any different sense from the other. It is difficult to conceive what relation they sustained to each other if not that of fellow-employees.

It is equally apparent, it seems to us, that the company was not guilty of any remissness in its conduct toward the deceased. No complaint is made of the "appliances" furnished. The cars and railroad track were properly constructed and equipped. The company furnished sufficient

and capable men to manipulate the cars. The negligence causing the death of the deceased must have been that of himself or his fellow-workmen. It is no answer to say that appellant did not furnish a safe crossing place for the employees. Any railroad crossing is not free from more or less peril. This was not more perilous than others. Besides, it was not the only one furnished by the company.

Again, as already seen, there could scarcely have been any danger, and no accident would have befallen the deceased if he and the other employees who were operating the cars had exercised the care which ordinary prudence and discretion demand.

Again, there is no issue raised as to the negligence of appellant in its failure to furnish a proper crossing. The gist of the charge is that the crossing was negligently closed, whereas it was the custom to have it kept open and free.

Under the decisions, also, there would seem to be no escape from the conclusion that deceased was guilty of contributory negligence in attempting to cross the track as he did. We must assume that on account of the box-car near him and the curve in the track that he could not see the approaching cars, and that he could not hear them on account of the noise of the machinery of the company's plant, but that would seem to be an additional reason why he should have exercised care. He certainly took desperate chances in acting as he did. If he had walked the length of a car toward Truckee he could have passed around the end of the train and he could without any difficulty have seen the approaching cars.

In *Memphis etc. R. R. Co. v. Copeland*, 61 Ala. 376, it is said: "The attempt thus to pass between the cars of a train which he must have known was liable to be moved cannot be classed as less than negligence. It borders on recklessness." To the same effect are *Lewis v. Baltimore etc. Co.*, 38 Md. 588, [17 Am. Rep. 521]; *Hudson v. Wabash etc. Co.*, 123 Mo. 445, [27 S. W. 717]; *Lake Shore etc. Co. v. Pinchin*, 112 Ind. 592, [13 N. E. 677].

In *Studer v. Southern Pacific Co.*, 121 Cal. 400, [66 Am. St. Rep. 39, 53 Pac. 942], our supreme court has said: "An attempt to pass between the cars of a train that is liable to move at any instant, without taking any precaution to avoid danger, is itself an act of negligence when decided by the standard of common prudence, and has been so held by

courts whenever the occasion has been presented; and the act is equally negligent whether it is done at a street crossing or elsewhere."

If the occurrence had taken place at an hour when most of the employees were accustomed to go to and from work, a different question might be presented. At those times it was the practice of the company not to move the cars in the vicinity of the crossing, but during working hours they were likely to be moved at any time. This the deceased knew and he was, of course, charged with notice of the danger incident to a railroad crossing, and the duty of "one intending to cross to avail himself of every opportunity to look and listen for approaching trains." The increase of the peril by the narrowness of the opening between the cars made more urgent his duty to protect himself by resort to the palpable means at hand. However lamentable the unfortunate occurrence, in legal contemplation it was the result of decedent's own negligence.

The judgment and order denying the motion for a new trial are reversed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 15, 1907.

[Crim. No. 47. Second Appellate District.—March 18, 1907.]

THE PEOPLE, Respondent, v. THOMAS STOKES, Appellant.

CRIMINAL LAW—ROBBERY—EVIDENCE—DECLARATION OF CONSPIRATORS—CIRCUMSTANTIAL EVIDENCE OF CONSPIRACY.—Upon a trial for robbery, where the prosecution sought to prove a conspiracy to commit the crime, so as to justify evidence of the declaration of a co-conspirator that the prosecuting witness had "lots of money," the conspiracy need not be established by direct evidence of the common design, but may be shown by circumstantial evidence sufficient to establish a *prima facie* case of an agreement to commit the crime.

ID.—ORDER OF PROOF OF DECLARATION AND CONSPIRACY—DISCRETION OF COURT—CODE PROVISION NOT MANDATORY.—The order in which the proof of the declaration of the co-conspirator and of the existence of the conspiracy may be admitted rests largely in the discretion of the trial court, which may permit the declaration to be first proved, under a proposal of the prosecution to supply proof of the conspiracy to rob. The provision of subdivision 6 of section 1870 of the Code of Civil Procedure allowing proof of the act or declaration of a conspirator, after proof of the conspiracy, is not mandatory.

ID.—EVIDENCE TENDING TO SHOW CONSPIRACY—QUESTION FOR JURY—INSTRUCTION—CONCLUSIVENESS OF VERDICT.—Where all the evidence bearing upon the question of the alleged conspiracy tends to prove it, its existence is a question of fact for the determination of the jury; and where, under proper instructions as to the effect of reasonable doubt on that question, the jury found that the agreement of the conspirators to rob was made, its verdict is conclusive of that fact.

ID.—DUAL FUNCTION OF EVIDENCE OF CONSPIRACY—GUILT OF DEFENDANT.—The evidence of the independent facts and circumstances which show the conspiracy to rob may at the same time supply evidence tending to prove the guilt of the defendant on trial; but the fact that it performs such dual function is no reason for excluding it.

ID.—EXISTENCE OF MONEY ROBBED—KNOWLEDGE BY ONE CONSPIRATOR IMPUTABLE TO ALL.—The existence of the conspiracy to rob the prosecuting witness being proved, the knowledge of one of the conspirators, however acquired, that he had a large sum of money, if acquired at any time before the consummation of the crime, was imputable to all of the conspirators, including the defendant on trial.

ID.—IMPEACHING EVIDENCE—FOUNDATION NOT LAID.—Witnesses for the prosecution cannot be impeached by their evidence given on a former trial where no foundation was laid for such impeachment as required in section 2052 of the Code of Civil Procedure.

ID.—ADMISSION BY DEFENDANT NOT AMOUNTING TO CONFESSION—PRELIMINARY PROOF NOT REQUIRED.—An admission made by the defendant in conversation with the sheriff while in custody, not involving a confession of the crime, which was negatived by him, but tending in connection with other facts proved to show his guilt, was admissible in evidence against him, without any preliminary proof that the admission was voluntarily made.

ID.—ERROR NOT AFFECTING SUBSTANTIAL RIGHTS.—Any error in the admission of evidence or in any ruling of the court, not appearing to affect the substantial rights of the defendant, must be disregarded.

ID.—DELAY IN PASSING SENTENCE—POSTPONEMENT—JURISDICTION NOT LOST.—The delay in passing sentence upon the defendant at the time fixed therefor, and the postponement thereof for thirty-five

days, shows no loss of the jurisdiction of the court to pronounce sentence.

ID.—JUDGMENT OF SENTENCE NO PART OF TRIAL.—Pronouncing judgment, which is the formal declaration of sentence, is not the trial, nor any part thereof, within the meaning of section 13, article I of the constitution.

ID.—END OF TRIAL—VERDICT.—The trial ended with the announcement of the verdict of the jury upon the issue of fact submitted to it for its decision.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Alfred Daggett, and H. T. Miller, for Appellant.

U. S. Webb, Attorney General, and E. E. Selph, Deputy Attorney General, for Respondent.

SHAW, J.—The defendant was convicted of the crime of robbery, and prosecutes this appeal from the judgment, as well as from an order of the court denying his motion for a new trial.

The case was tried upon the theory that defendant Stokes, a man by the name of Kincaid, and one Mart Bennett formed a conspiracy to commit the robbery. The latter was called as a witness and testified on behalf of the prosecution. It appears from his testimony that he was a self-confessed, active participant with defendant in the commission of the crime.

The facts, briefly stated, are that on the night of October 18, 1905, one Owen Connolly was robbed in the back yard of the Visalia House in the city of Visalia. He had on the day before come to Visalia from Millwood, where he had been working, and had brought with him the proceeds of his labor consisting of several hundred dollars. There was adjoining the office of the Visalia House a saloon and bar, and at the time William Kincaid was the bartender in charge thereof. During the evening of October 18th, Connolly spent most of his time in this bar, and it seems became quite well acquainted with Kincaid, and the latter had learned of

the fact that Connolly had upon his person a considerable sum of money.

During the daytime, and until about 11:25 P. M. of October 18th, when he arrived at Visalia, going immediately to the Visalia House saloon, the defendant was in Tulare City. Prior to his arrival Connolly had applied to the clerk of the Visalia House for a room. The clerk demanded payment in advance, and Kincaid paid to the clerk the amount demanded for the room, at the same time telling the clerk that he, Connolly, had lots of money, and if he, Connolly, paid him for the bed, the clerk should return to him, Kincaid, the sum paid by the latter.

The first alleged error in the record to which our attention is directed was the ruling of the court in permitting the hotel clerk to state what was said by Kincaid upon the occasion of his paying for this room for Connolly's use. It was and is now claimed by defendant that the evidence sought to be adduced by the question calling for this conversation was irrelevant, incompetent and immaterial to any of the issues in the case; that the conversation did not take place in the presence of the defendant, and that there was no evidence introduced that tended to show any relation between Kincaid and defendant and Connolly, who was robbed. Whereupon the district attorney stated to the court that he proposed to make that connection. Defendant's objection was thereupon overruled.

The same objection was interposed to like questions throughout the trial, and the rulings of the court were adverse to defendant.

Defendant contends that there was no evidence tending to establish any conspiracy or other unlawful relation between Kincaid and defendant, and that hence, under section 1848, Code of Civil Procedure, defendant could not be prejudiced by any act or word of Kincaid not occurring in his presence. And further, that subdivision 6 of section 1870 provides that it is only after proof of a conspiracy that evidence of the act or declarations of a conspirator can be offered against his co-conspirator. Defendant places great weight on the word "after." We cannot, however, agree with counsel in his contention upon that point.

It is not often that direct proof of a common design to commit a crime can be had; its existence is usually established

by independent facts, which, although they may be remote from the main subject of inquiry, and, standing alone, seem of little importance, but nevertheless when all are taken together are amply sufficient to establish a *prima facie* case of the existence of an agreement to commit a crime. Conspiracy, like any other fact in issue, may be proved by circumstantial evidence, and, notwithstanding subdivision 6 of section 1870, Code of Civil Procedure, the order in which the evidence may be introduced must rest largely with the trial judge. The provisions of the code cited are not mandatory. (*People v. Compton*, 123 Cal. 408, [56 Pac. 44]; *People v. Donnolly*, 143 Cal. 394, [77 Pac. 177].)

The prosecution here, in substance, stated, in reply to the objection, that it would show the relation existing between Kincaid and defendant; that the act or circumstance was merely a link in the chain of circumstances going to establish the relation of conspirators, and showing defendant's connection with the crime. Under the circumstances of this case, we find no fault with the course adopted by the trial court. (*People v. Daniels*, 105 Cal. 262, [38 Pac. 720].)

If all the evidence bearing upon the question of the alleged conspiracy, taken together, tends to establish its existence, it then becomes, like any other fact pertaining to the subject of inquiry, a question for the determination of the jury.

Where the existence of a conspiracy is one of the issues, independent facts and circumstances which establish it may at the same time supply evidence tending to prove the guilt of a conspirator on trial, but the fact that it performs the dual function is no reason for excluding it. There were three alleged conspirators here, but it was Kincaid's conduct, acts and movements which were the subject of inquiry when the alleged errors were committed, and his conduct, conversation and acts during the period covered by the inquiry were not only competent and material as tending to show the existence of a common design between him and the defendant to commit the robbery, but, at the same time, in case the jury found the conspiracy to be actually established, constituted evidence tending to establish defendant's guilt.

Taken together, the circumstances and facts disclosed tended to show that the conspiracy existed, and the jury were instructed that, "if not satisfied from the evidence beyond all reasonable doubt that there was an agreement and

understanding made and had between the said William Kincaid, Martin Bennett and the defendant to perpetrate the offense alleged in the information, then it is the duty of the jury to *disregard all the testimony* adduced in this case tending to prove any declaration, act or conversation of said William Kincaid and Martin Bennett, and each of them, made or done *in the absence of the defendant Thomas Stokes.*"

Under this instruction the jury found that there was such an agreement and understanding made, and its conclusion is final. (*People v. Fehrenbach*, 102 Cal. 394, [36 Pac. 678]; *People v. Donnelly*, 143 Cal. 394, [77 Pac. 177].)

Appellant lays much stress upon the fact that all the evidence relative to Connolly's having money shows a knowledge on the part of Kincaid only, and that this was acquired by Kincaid before the defendant arrived in Visalia. The existence of the conspiracy being shown, it must be presumed that the knowledge of all the conspirators was brought into play in the execution of the joint undertaking. The individual knowledge of each is imputed to all, and it is not material when or how this knowledge was acquired, provided it was before the consummation of the crime. The purpose of the robbery was to wrongfully obtain money, and evidence tending to show that the defendant knew that Connolly had money would show a motive for the crime. The jury being satisfied of the existence of the conspiracy had a right to presume that the defendant had the same knowledge and information relative to Connolly having money upon his person that Kincaid was shown to have had.

Upon cross-examination both Connolly and witness Wessendorf were interrogated as to their testimony given on a former trial, and objections were sustained. No foundation was laid for such impeachment. (Code Civ. Proc., sec. 2052; *People v. Fitzgerald*, 138 Cal. 41, [70 Pac. 1014].)

Later, the former testimony of Wessendorf was read to him and he answered the question.

The court ruled that witness Wessendorf might make an explanation of his testimony, to which ruling defendant excepts; but as it does not appear that the witness offered to make any explanation, such ruling could not affect the rights of defendant.

No exception was taken to the ruling of the court in sustaining objection to the question asked witness Bacon as to whether he was in the bar when they were talking about closing up the house; and the later question as to whether he took supper with the defendant that night was clearly objectionable for the reason that it was not cross-examination.

The sheriff, who placed the defendant under arrest, was permitted over objection of defendant to testify as to conversation had with him after he was placed in jail. It is urged that it does not appear that the statements made by defendant to the sheriff were voluntary, and defendant invokes the well-recognized rule applicable to confessions: "A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor to another, of the agency or participation he had in the same." (*People v. Strong*, 30 Cal. 151.)

The defendant does not admit that he had any agency in the commission of the crime, but, on the contrary, his statement as to his movements and whereabouts is calculated to negative any participation in it. Even if he made statements which in themselves did not involve his guilt, yet when connected with the other facts tend to prove him guilty, such admissions would nevertheless be competent without preliminary proof. (*People v. Le Roy*, 65 Cal. 613, [4 Pac. 649]; *People v. Ammerman*, 118 Cal. 23, [50 Pac. 15]; *People v. Jan John*, 144 Cal. 284, [77 Pac. 950].)

Witness Bentley, after stating that there was a jingle of some coin in the pocket of Connolly, the prosecuting witness, was asked with reference to what kind of coin it was. Objection was made to his testifying upon this subject. After testifying that he could tell the difference between gold and silver by the jingle or sound and that he had often noticed the difference, he was permitted to testify over defendant's objection that the jingle that he heard in the pocket of Connolly sounded to him like heavy gold. He does not state that it was gold, but merely that the jingle *sounded* like gold. In view of the test made as disclosed by the record, the evidence carried little weight and it cannot be said that defendant was prejudiced by its admission.

We have fully considered every alleged error occurring at the trial. Only one other merits notice. Connolly had been knocked down in the back yard of the Visalia House as he

was leaving a water-closet. After regaining consciousness he made his way to the door of the hotel and was let in by the clerk. Just what space of time elapsed after he was knocked down and his money taken before he again entered the hotel is not disclosed. Just before Connolly came in Kincaid and defendant came from the bar through the office of the hotel and entered a hall from which a stairway led upstairs, where defendant had a room. After the clerk had let Connolly into the hotel he, the clerk, went to the door, calling for the marshal, and during this time Kincaid came out from the hallway. The witness Deible was asked the following questions:

"What did he [Kincaid] do when he came into the room, where did he first go?"

"He walked up to the bar-room door, then he turned and he went back, I think, toward the main entrance that was on the east side, this hallway (showing on the map). He might possibly went out. I wouldn't be positive in regard to that."

Question: "What did you see Kincaid do after that? Now, I am not asking for anything he said, but what did you see him do?" Answer: "Well, Mr. Kincaid came back and he made the remark to—he walked over to the wash-bowl and he got a towel and he sponged Mr. Connolly off."

The witness Wessendorf, after stating that he saw Kincaid after the consummation of the robbery—after he came back into the hotel—was asked the question:

"Where did he come from?" Answer: "He must have come out from the stairs; he couldn't come from nowhere else, because the doors were all locked."

Question: "Where were you when you saw him?" Answer: "I was standing on the sidewalk hollering for the marshal when I saw Kincaid. I saw him come out of the office onto the street, and I saw him back in that office again wiping the blood off of Connolly. He had gone out onto the street before he wiped the blood off Connolly."

The sheriff, after stating that he arrested Kincaid, was asked:

"What was done with him when he was brought down?" Answer: "I asked him to remove his shoes, which he did, searched him and locked him up. He removed his shoes at my request and in my presence."

Defendant objected to all of these questions upon the ground that they were irrelevant, incompetent and immaterial, and related to what took place subsequent to the consummation of the alleged offense and not in the presence of defendant.

We are not unmindful of the general rule that evidence of the declarations and appearance of a co-conspirator directed to matters occurring after the commission of the offense, and not in the presence of the defendant on trial, is inadmissible. (*People v. Opie*, 123 Cal. 294, [55 Pac. 989]; *People v. Dilwood*, 94 Cal. 89, [29 Pac. 420].) The fact that Kincaid procured a towel and washed the blood from Connolly's face was, however, competent evidence as tending to corroborate Connolly's testimony that he had been knocked down; it tended to show his condition immediately after the robbery; that his face was covered with blood to such an extent that another, whether as an act of kindness or otherwise, deemed it necessary to remove the blood. It was an independent act, and where Kincaid came from and his movements around the saloon immediately preceding the act of washing Connolly's face were but recitals of the circumstances connected with the principal act of washing the face. They amounted to but a detailed history of the transaction, which tended to corroborate the statement of the prosecuting witness that, by force and violence, he had been robbed. Conceding the questions to be irrelevant and the testimony elicited incompetent, and for that reason erroneously admitted, still the evidence, so far as fixing the robbery upon Stokes, was of such a character as to be wholly immaterial and without any weight. The answers threw no light whatever upon the issue as to whether or not Stokes was a participant in the robbery. We are unable to see how it affected the substantial rights of the defendant, without which being made to appear affirmatively, the error, if any, must be disregarded. (Pen. Code, sec. 1258.) "If the evidence objected to had been excluded, we do not see how the jury could have entertained a doubt of the fact of the robbery, or of the identity of the defendant as one of the robbers." (*People v. Clark*, 106 Cal. 41, [39 Pac. 53].)

The jury rendered its verdict on March 19, 1906, and April 2d following was by the court fixed as the date of pronouncing judgment, which, however, upon motion of counsel for

defendant, was postponed to April 16th, and on that date, upon like motion, again postponed until April 30, 1906. Nothing further was done until June 4, 1906, when defendant was brought before the court for judgment, whereupon he objected to judgment being pronounced upon the ground that, by reason of the delay, had without defendant's consent, the court had lost jurisdiction to pronounce any judgment upon said verdict, and it is now claimed that the judgment entered is without authority, and therefore null and void.

At defendant's request, April 30th was the time fixed by the court for pronouncing judgment. There was, at most, a delay of thirty-five days, including intervening Sundays and holidays. We cannot assent to the proposition that, by reason of this delay, the court lost jurisdiction to pronounce sentence. The delay was undoubtedly due to the holidays proclaimed by the governor of the state and which continued throughout the month of May, 1906. It is not necessary to pass upon the question as to whether this holiday period of one month would excuse and justify an otherwise unwarranted delay, for the reason that we are of the opinion that, even though it be held that the act of pronouncing judgment is a part of the trial, the court did not, by reason of the postponement from April 30th to June 4th, lose jurisdiction in the matter.

A trial is "the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue." (*Anderson v. Pennie*, 32 Cal. 267; *Tregambo v. Mining Co.*, 57 Cal. 501.) Pronouncing judgment, which is the formal declaration of sentence, is not the trial, nor any part thereof within the meaning of section 13, article I, of the constitution. (*Reed v. State*, 147 Ind. 41, [46 N. E. 135].) In a Missouri case (*State v. Watson*, 95 Mo. 415, [8 S. W. 383]), judgment was pronounced two years after verdict, and the court passing upon a statute requiring that defendant be brought to trial within a specified time after indictment, otherwise to be discharged, held that such limitation did not apply to the pronouncing of sentence. The supreme court in *People v. Felix*, 45 Cal. 163, upholds a sentence pronounced at the third term after conviction. The trial ended with the announcement of the verdict of the jury, whereby it de-

clared the result of its deliberations upon the issues of fact which had been submitted to it for its decision.

A careful examination of the voluminous record in this case impresses us with the fact that, notwithstanding the very able, ingenious and persistent effort of counsel to specify an error therein, such effort has failed, and the order and judgment should be, and are, affirmed.

Allen, P. J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 9, 1907.

[Civ. No. 328. Second Appellate District.—March 18, 1907.]

GERMAN SAVINGS AND LOAN SOCIETY, Appellant, v.
MARION ALDRICH, City Treasurer, etc., O. NELSON,
and SANTA BARBARA COUNTY NATIONAL BANK,
Respondents.

PRELIMINARY INJUNCTION—LIMIT OF CONTINUANCE—CONSTRUCTION OF AMENDMENT TO CODE.—The amendment of 1895 to section 527 of the Code of Civil Procedure, fixing the limit of twelve months beyond which a preliminary injunction will cease to operate if certain conditions do not exist, applies equally, whether the injunction is granted after notice or *ex parte*, and involves no question of remedy by appeal, or of *res adjudicata*. At the expiration of the twelve months, if the conditions stated do not apply, the injunction becomes inoperative and the parties beneficially interested are entitled to have the court so declare.

ID.—PROPER EXERCISE OF JURISDICTION.—It is a proper exercise of the court's jurisdiction to ascertain and find the facts as to the conditions; and declare by its order that the injunction is no longer in force, if the facts warrant such deduction. The only thing before the court is the ascertainment of the facts upon which the right depends.

APPEAL from an order of the Superior Court of San Bernardino County, dissolving a preliminary injunction.
Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

R. M. F. Soto, for Appellant.

Hunsaker & Britt, for Respondents.

TAGGART, J.—This is an appeal from an order dissolving a preliminary injunction.

The injunction was granted upon notice and service of an order to show cause regularly made. The order dissolving the injunction was also made upon motions separately filed by each of the defendants after hearing duly noticed.

The sole ground of each of the motions was the delay in bringing on the cause for trial on its merits. The notices of motion specify, and the affidavits in support of them aver, that the injunction was granted prior to the trial of said action; that the same has continued in force for a longer period than twelve months from the time it was granted; that the parties to said action have not consented that the same shall continue in force for a longer period than "six months," in one case, and in the other, "any period of time, or at all"; and that the said action has not been set for trial on its merits. Both notices and affidavits follow the language of the amendment of section 527 of the Code of Civil Procedure made in 1895.

Appellant contends that the preliminary injunction having been granted after hearing, the court was without power to dissolve the same; that the matter was *res adjudicata*; that the only remedy was by appeal from the order granting the injunction; that, assuming the court had the power to dissolve, this could be exercised only upon new matter or evidence arising since the granting of the injunction; and that the amendment of section 527, Code of Civil Procedure, must be limited in its application to a preliminary injunction granted *ex parte*, where no motion either to dissolve or modify such injunction has been made or denied.

The determination of these contentions depends solely upon a construction of the amendment of section 527, and so far as we are aware, it has not been construed by any appellate court. A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. (*Davis v. Hart*, 123 Cal. 387, [55 Pac. 1060].)

Section 527, Code of Civil Procedure, as it originally stood, provided at what time a provisional injunction might be granted, and what was required to obtain it. By the amendment of 1895 a limit was fixed, beyond which a provisional injunction would not be operative, if granted before the actual trial of the cause wherein it was granted. This limitation was placed at twelve months from the time the injunction was granted. Two exceptions were made to the operation of the amendment, those cases in which the injunction is continued for a longer period by consent of the parties, and those in which the cause has been set for trial upon its merits before the period of limitation expires.

It was not intended by the framers of the amendment to provide any *remedy* for the party against whom the injunction runs, and therefore the question of his having a remedy by appeal has no application.

The matter adjudged by the court in making the order complained of is not *res adjudicata*. When the court made the order it did not review, reconsider, or pass upon the matters determined in granting the injunction. The expiration of the twelve months, the want of consent on the part of the defendants, and that the cause had not been set for trial on its merits were all the matters before the court.

There is nothing in the language of the amendment to justify any distinction between injunctions granted *ex parte* and those granted after a hearing of all the parties. The wrong to be remedied by the amendment was the abuse of provisional injunctions obtained before trial of the causes on their merits by using them, through delay of the trial, to serve the purpose of a final judgment. The remedy given, a limitation of the period of their effectiveness, was as much needed in cases of injunctions granted on hearing as in those granted on *ex parte* application.

The period of twelve months having expired, and the case being neither tried nor set for trial on its merits, the injunction became inoperative, and, upon application to the court, the parties beneficially interested were entitled to have the court so declare.

There is no formal signed order dissolving the injunction in the record. The minute entry, "Motion to Dissolve and Vacate Injunction. Present, Hunsaker & Britt and McKeeby & McKeeby. Motion granted," is all that appears. It is not

material whether this order be designated an order dissolving an injunction, or an order declaring the dissolution of an injunction by operation of law. The law having declared the writ to be inoperative after a certain time, upon certain conditions, it appears to us to be a proper exercise of the court's jurisdiction to ascertain and find the facts as to the conditions and declare by its order that the injunction is no longer in force, if the facts warrant such a declaration.

The motion that may be made under this amendment is in some respects similar to the proceeding to declare the termination of a life estate under section 1723, Code of Civil Procedure. The only thing before the court is the ascertainment of the existence of the facts upon which the right depends. (*Matter of Tracey*, 136 Cal. 385, [69 Pac. 20].)

A mere declaration not in form of an order might not be appealable (*Devlin v. Rydeberg*, 132 Cal. 324, [64 Pac. 396]), but all parties here have treated the appeal from the order in question as proper, and it has been considered on its merits. The objection that the notice of appeal was not filed in time appears to have been withdrawn by stipulation.

Order affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 252. Third Appellate District.—March 18, 1907.]

ALBERT E. GIACOMINI, Respondent, v. PACIFIC LUMBER COMPANY, Appellant.

NEGLIGENCE—MASTER AND SERVANT—INDEPENDENT CONTRACTOR—QUESTION OF FACT FOR JURY.—In an action by a servant for damages caused by the negligence of defendant as his employer in failing to furnish safe appliances, where there is a dispute whether plaintiff was the servant of the defendant or of independent contractors, and it appears that plaintiff was paid by defendant, and the evidence is such that the existence of the relation of independent contractors is in doubt, its existence is a question of fact for the jury, and a verdict for the plaintiff will not be disturbed upon appeal.

ID.—INSTRUCTION SUBMITTING QUESTION OF FACT—DETAIL OF EVIDENCE.—Where the court, in submitting to the jury the question of

fact whether the persons claimed to be independent contractors were such or mere servants of the defendant, properly instructed them as to the law of the case, though it may have been unnecessary to detail the evidence, the action of the court in calling attention particularly to the evidence which must be the basis of the jury's finding cannot be successfully assailed.

ID.—UNSAFE APPLIANCE—EVIDENCE OF NEGLIGENCE—SUPPORT OF VERDICT.—Where the evidence shows that the machine on which plaintiff was injured was originally unsafe, and that an appliance was put thereon to make it less dangerous, in respect to which the master was negligent in failing in his duty to keep it secure, or to inspect the machine and appliance, and in failing to warn plaintiff, who, in ignorance of the manner in which it was fastened, was requested by an inexperienced workman to adjust the loosened appliance, to his injury, the evidence of negligence is sufficient to support the verdict for damages.

APPEAL from a judgment of the Superior Court of Humboldt County, and from an order denying a new trial. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

Gillett & Cutler, and D. Servier, for Appellant.

Mahan & Mahan, and Coonan & Kehoe, for Respondent.

BURNETT, J.—A jury awarded respondent the sum of \$3,500 as damages for injuries received in a shingle-mill belonging to appellant. The appeal is from the judgment and order denying the motion for a new trial.

The complaint alleges that "on the twelfth day of December, 1900, and for some time prior thereto, said plaintiff was employed by defendant in the capacity of shingle sawyer at one of said machines (a hand-shingle machine) so known and designated as machine No. 3, with instructions to attend to the setting of the screws of said other hand-shingle machines when the same were being operated by inexperienced men.

"That on said twelfth day of December, 1900, and for some time prior thereto, said machine known and designated as machine No. 2 was in a defective and dangerous condition, in this, that on the frame of the carriage of said machine, and on the side nearest the saw was fastened at the time of

the accident hereinafter described, an appliance, used to prevent spalts from coming in contact with the saw." Then follows a description of said appliance and the manner in which it was fastened to said machine, and an allegation that it was so insecurely fastened as to render the machine "defective, dangerous and unsafe to persons engaged in operating or working about said machine," and that it had been in such condition for several months to the knowledge of defendant, or that defendant could have known thereof by the exercise of ordinary care and diligence, but "negligently permitted and suffered the same to be and remain during all of said time in said defective, dangerous and unsafe condition. That on said twelfth day of December, 1900, while said machine was in said defective, dangerous and unsafe condition as aforesaid, it was being operated by an inexperienced man, one Charles Bilderbach, who requested said plaintiff herein to set the screws on said machine, which said screws are used for the purpose of adjusting the table of said machine so that the shingles may be cut of the proper thickness, and while said plaintiff was so engaged in setting the screws on said machine at said time, it became necessary for said plaintiff to push the carriage of said machine back and forth over said rapidly revolving saw, and while doing so the said appliance . . . dropped down at one end and came in contact with said saw and was torn from its place and struck plaintiff," inflicting serious injuries.

As usual in cases of this character, there is little controversy as to the law in the abstract, but counsel differ widely as to the effect of the evidence and what particular principles of the law of negligence should be invoked.

1. The appellant earnestly insists, and its main point is, that the evidence shows without conflict that defendant was absolved from all blame for the accident for the all-sufficient reason that plaintiff was not in its employ, but was working for Ansel R. Thompson and Thomas Maddux, who, it is alleged in the answer, "were engaged in manufacturing shingles in said mill for said defendant under an agreement with defendant that defendant was to furnish the power and machinery and keep the machinery in repair, and said Thompson and Maddux were to receive a specified amount per thousand shingles for manufacturing the same for defendant with said machinery and from material furnished by defendant."

In other words, it is contended that Thompson and Maddux were "independent contractors," and that the doctrine of *respondeat superior* does not apply to appellant. Respondent claims that the evidence leaves debatable the question whether there was such a contract, and that it therefore became a proper subject of consideration at the hands of the jury; and that this court cannot say that the finding adverse to appellant rests upon unsubstantial support. Does the evidence demand the conclusion that the relation of "master and servant" or employer and employee existed between Thompson and Maddux on the one hand and respondent on the other? If so, the judgment cannot be upheld.

Section 2009, Civil Code, provides that: "A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who in such service *remains entirely under the control and direction of the latter* who is called the master." If any addition to the code definition or any elucidation of it were needed, it could be supplied by quotation from many authorities, as the question has been often the subject of judicial cognizance. By this code provision as well as by the decisions it is made clear that in determining whether Thompson and Maddux were independent contractors or fellow-servants with respondents the vital inquiry is, Who had "*entire control and direction*" of respondent in the service he was performing? If there had been a written agreement between appellant and said Thompson and Maddux, or if there were no uncertainty as to the scope and terms of said agreement, a question of law would be presented, but it is insisted by respondent that in view of the evidence, it was a question of fact under proper instructions to be submitted to the jury to determine whether respondent was the employee of one or the other. "Where an alleged contract rests entirely in parol, it is the province and duty of the jury to determine whether there is a contract, and to ascertain and fix its terms, unless these terms are precise and explicit and admit of one construction only." (11 Ency. of Pl. & Pr. 88.) And in aid of the effort to reach a satisfactory conclusion as to whether a party is an independent contractor or a fellow-servant, it is, in the nature of things, impossible to formulate inflexible rules which will cover all conceivable circumstances that may be received in evidence, but there are certain well-

recognized guides of general application that point the way to a conclusion. For instance, it has been announced that an "independent contractor represents his employer only as to the results of the work and not as to the means whereby it is to be accomplished." (*Casement v. Brown*, 148 U. S. 615, [13 Sup. Ct. Rep. 672].) Again, "A contractor for certain work may at the same time be the servant of the same employer in regard to other work to be done by him, so as to render the latter liable for his acts in connection with such other work." (16 Am. & Eng. Ency. of Law, 187.) Again, "If the employer has the right of control, it is immaterial whether he actually exercises it." (*Linnehan v. Rollins*, 137 Mass. 123, [50 Am. Rep. 287].) And "a reservation by the employer of the right by himself or his agent to supervise the work merely to determine whether it is being done in conformity to the contract does not affect the independence of the relation" (*Callan v. Bull*, 113 Cal. 593, [45 Pac. 1017]); the fact that payment is made "by the job" or "according to the amount of the work done does not make an employee an independent contractor, though it may be evidence that he is such." (16 Ency. of Law, 189.)

But the ultimate standard by which all the evidence must be measured is that prescribed by the code: Who has the undisputed and complete control of the servant? Appellant in the case at bar answers: Thompson and Maddux. That is its interpretation of the evidence, and in so many words it is so declared by some of the witnesses, but the jury had a right to consider all the facts and circumstances bearing upon the relation of the parties, and must it be affirmed, as a matter of law, that there is no warrant for the finding that Thompson and Maddux were fellow-servants of respondent within the meaning of the code? The declarations of certain witnesses for defendant undoubtedly did not carry conviction to the minds of the jury, and there were facts and circumstances considered more satisfactory and these led to a different conclusion.

In his opinion denying the motion for a new trial the learned judge of the lower court recites a large number of these circumstances, which the jury had the right to consider in determining whether there was any such contract as claimed by appellant, among which are the following: The compensation of Thompson and Maddux was subject to

change at any time and was frequently changed by the company. Whatever the agreement, it was for no definite term and could be terminated at any time by either party to it. The company owned the sawmill and the shingle machines, one of the machines being placed in the main part of the building and two in the addition which was built later. The same power ran the main mill and the shingle machines. The company furnished all the machinery, the power, the lights, made all important repairs and furnished all the oil for the machinery. The material to be manufactured into shingles was the refuse from the main mill, carried down to the shingle machines by elevators, the material being taken from the same by the men in the employ of the company. The shingle machines were dependent entirely upon the main mill for material to be manufactured into shingles. Thompson was the principal man in the shingle department, looked after the work, but at times was called into the main mill and worked there when the shingle machines were idle, and when they were running he occasionally filed saws in the big mill, and he filed for the shake machine, and he was paid therefor one dollar a day, which he says he divided with Maddux. Maddux also did some filing in the main mill, and they often worked at various jobs therein when the shingle-mill was idle and the other men in the shingle-mill did the same. One of the shingle sawyers worked for three days in the big shingle-mill up the track for defendant, and at the end of the month he received his wages from the company in the same manner as when he was working all the time in the shingle department of the main mill. If they were short of stock, Thompson and Maddux complained to Howatt, the general foreman of defendant, and if stock was accumulating, Howatt would not permit them to shut down. Howatt passed through the shingle department sometimes two or three times a day and frequently criticised the work of the men and occasionally gave them orders. On one occasion, when Howatt was disabled, Thompson took his place as foreman of the main mill and continued therein for a week or more. On the 15th of each month, when the company paid all its employees, the men in the shingle department lined up at the office precisely the same as the men in its employ did, and were paid at the office window in turn by checks given by the company, or, if the amount was small,

sometimes in cash. However, the evidence for defendant shows that this was charged upon the books of the company to Thompson and Maddux. The latter lined up as the other men at the same time and received their pay in the same manner. The names of all the men were on the pay-roll kept by the company and opposite their names was a statement showing the amount due each for wages during the month and the amount due the company for bills incurred by them at the store or saloon or livery-stable owned by the company. The men in the shingle-mill signed the pay-roll just as the other men did. Mrs. Ferguson, at whose place respondent and others boarded, applied at the office of the company and signed the roll as the others did, and received her pay for food in the same way. On some occasions the company deducted from the pay of the men working in the shingle department the amount due for state and county poll taxes. The assessor had notified the company to keep out for him the money due from the men in its employ for poll taxes, but had never made such a request particularly as to the men working in the shingle department or for Thompson and Maddux.

To show how uncertain the contract was, even in Mr. Thompson's mind, we have in his cross-examination the statement: "I did enter into the contract with Mr. Sinclair alone, and when Mr. Douglas took charge he simply let the contract run along and we acted on it. That is the only contract that we have with the Pacific Lumber Company at the present time, and it was the only contract that we had at the time Giacomini was employed. Mr. Maddux, Mr. Sinclair and myself were the only three present when the last contract was made. We didn't put it in writing. It never had been in writing. We simply manufactured our shingles for so much a thousand. When times got harder and we got our men cheaper they cut us down; then when it got hard to get men we had to come to them to pay more. That is the way the contract ran. We never had it any other way. This contract was subject to change with the varying price of lumber and the varying demand for men. It was understood that the contract could be abrogated on either side at any time. If our work didn't prove satisfactory, they could immediately come in and take their machinery and let us go." He went on further to state that he did not know just when

the contract was made nor what price they were to receive for shingles. And altogether his testimony was so uncertain that it might justly carry very little if any weight with the jury. There was at least sufficient uncertainty to justify the submission to the jury of the question whether there existed between defendant and Thompson and Maddux such a contract as constituted the latter "independent contractors." It cannot be held, we think, that the probative force of the foregoing circumstances indicating the conduct of the parties, considered with the manner and appearance of the witnesses, which cannot be disclosed by the record, is insufficient to justify the verdict.

Among the many cases in the books involving similar questions to those considered herein the following are instructive: *Indiana Iron Co. v. Gray*, 19 Ind. App. 565, [48 N. E. 803]; *Bummel v. Dilworth*, 111 Pa. St. 343, [2 Atl. 355]; *King v. New York etc. R. R. Co.*, 66 N. Y. 187, [23 Am. Rep. 37]; *Klages v. Gillette Herzog Man. Co.*, 86 Minn. 458, [90 N. W. 1116]; *Gahagan v. Aerometer Co.*, 67 Minn. 252, [69 N. W. 914]; *Rait v. New England Furniture & Carpet Co.*, 66 Minn. 76, [68 N. W. 729]; *New Albany Forge & Rolling Mill v. Cooper*, 131 Ind. 363, [30 N. E. 295]; *Neimeyer v. Meyerhauser*, 95 Iowa, 497, [64 N. W. 416]; *Nyback v. Champagne Lumber Co.*, 109 Fed. 732, [48 C. C. A. 632]; *Carlson v. Stockens et al.*, 91 Wis. 432, [65 N. W. 59]; *Toomey v. Donovan*, 158 Mass. 232, [33 N. E. 396]; *Smith v. Belshaw*, 89 Cal. 427, [26 Pac. 834]; *Callan v. Bull*, *supra*; *Corlett v. Southern Pacific Co.*, 136 Cal. 642, [69 Pac. 422]; *Shea v. Pacific Power Co.*, 145 Cal. 682, [79 Pac. 373].

In the Carlson case, it is held that "when in an action for damages caused by the negligent opening of a dam for the purpose of driving logs, there is evidence that the person in charge of the drive was acting as defendant's agent, and also evidence that he had full control of the drive and dam, and that he employed the men and obtained the supplies, defendants merely paying him for driving their logs, it is for the jury to determine whether such person was an independent contractor or not."

In the Toomey case, as stated in the syllabus: "In an action by a workman in defendant's factory for personal injuries caused by a defective machine, it appeared that under a contract with defendants one T. had charge of the fitting room

in the factory—in whose room plaintiff worked—and hired and paid the men who worked therein and was himself paid by the case for fitting stocks, and that defendants furnished all the machinery and ‘looked out’ for the room. There was testimony that they were about the room often; that they kept the machinery so that it would be all right to do the work in any way, shape and manner; that they had to pay for repairs, but T. had the right if there was any necessity for repairs to go to a certain person and have them made; that they relied on T. to examine the machinery and they had repairs made after notice from him; that they had the right and the opportunity to inspect the machinery and they never hired anyone to clean the machines, but supposed T. would attend to that, though they had no agreement to that effect.” It was held by the supreme court of Massachusetts that the court should have permitted plaintiff to go to the jury as to the common-law liability of defendants.

It is, of course, not our province to pass upon the weight of the evidence or the credibility of the witnesses, nor are we concerned about the question whether the verdict is just or in accordance with the preponderance of the evidence. We hold simply that there is substantial support for the verdict and it is therefore binding upon appeal.

2. Another point emphasized by appellant is, that the court erred in giving of its own motion an instruction marked “A.” The instruction, which is quite lengthy, defines a servant and an independent contractor and directs the jury that “the question is to be determined by all the evidence bearing upon the point; as to the nature and terms of the contract between the parties, as to the location and situation of the entire mill and machinery,” etc., calling attention to the various features of the evidence, “with all the other evidence, facts and circumstances in the case which will aid you in determining the true relation between Thompson and Mad-dux and the defendant, that is, whether Thompson and Mad-dux were independent contractors within the law as I have defined it to you, or whether they were the agents or servants of the defendant within the meaning of the law as I have defined that relation to you.” It probably was unnecessary for the court to detail the evidence which was to be considered, as the general direction in reference to all the evidence was ample; but the instruction is correct in its defini-

tion of the relations involved; it does not purport to pass upon the weight or effect of the evidence, and it is not apparent how it could have prejudiced the defendant. As it was proper for the jury to determine whether Thompson and Maddux were independent contractors or were servants of the defendant, the action of the court in calling attention specifically to the evidence which must be the basis of the finding cannot be successfully assailed.

3. Some minor points are made by appellant which hardly demand extended notice and which may be considered together. The rulings of the court during the progress of the trial, if erroneous at all, were without prejudice. The instructions refused, as far as correct and appropriate, were covered by those given.

The point is urged here that the appliance of which complaint is made was not shown to be unsafe and insecure or dangerous and that the servant assumed the risk. The law applicable to this contention was properly presented by the instructions, but the jury on sufficient evidence found the facts to be in accordance with respondent's position. There is no doubt, as stated in *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, [49 Pac. 559], that "the master must supply his employees with suitable appliances and a reasonably safe place in which to perform their tasks, and cannot relieve himself from responsibility by delegating to any servant a duty which rests upon him as master; but where the overseer or foreman is negligent in any duty which does not devolve upon the master, then the master is not responsible for an injury resulting therefrom to another servant in the same general employment." The evidence here, however, shows that the machine originally furnished was unsafe and the appliance was put on to render it less dangerous. It was the duty of the master to see that this appliance was safely secured. There was evidence of negligence in that respect. The law also requires the master "to inspect the machinery and appliances furnished to his servant and this duty must be continuously fulfilled and positively performed." (*Dyas v. Southern Pacific Co.*, 140 Cal. 296, [73 Pac. 972].) It cannot be said that respondent assumed the risk, as he was not at work upon this particular machine, but went there to adjust it at the request of an inexperienced workman, and the respondent was ignorant of the manner in which the ap-

pliance was fastened to the machine. "Under such circumstances it is the duty of the master to warn the employee." (*Tedford v. Los Angeles Electric Co.*, 134 Cal. 76, [66 Pac. 76].) "To relieve the master, the employee must not only know of the defect, but also must know the dangers and risks attending the operation of the machines by reason of the defects." (*Nofsinger v. Goldman*, 122 Cal. 609, [55 Pac. 425].)

There was sufficient evidence, if believed by the jury, to uphold the contention of respondent in harmony with the foregoing principles of law. It may be conceded that the case is a close one, but an appellate court should not substitute its own judgment of the facts for that of the trial court or of a jury, nor should a verdict be lightly disturbed.

We are not prepared to say that there is an entire absence of evidence to support the verdict or that there was any prejudicial error committed. The judgment and order denying the motion for a new trial are affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 256. Third Appellate District.—March 19, 1907.]

F. ERNEST ALLSOPP, Respondent, v. JOSHUA HENDY MACHINE WORKS, Appellant.

ACTION FOR ACCOUNTING—PLEADING—FINDINGS—AGENCY FOR RESALE OF PROPERTY—CONVERSION—SURPLUSAGE—CAUSE OF ACTION NOT CHANGED.—In an action for an accounting under an agreement for resale by defendant of property before sold by him to plaintiff, and intrusted to defendant as agent for resale, where it appears that a portion of the property was resold, and the complaint and evidence and findings support the cause of action for an accounting, an averment and finding that the property not resold was misappropriated by defendant to his own uses, do not change the cause of action to one of tort for conversion, but are immaterial and may be disregarded as surplusage.

Id.—LIABILITY OF AGENT TO ACCOUNT—ABUSE OF TRUST—COMMINGLING OF MACHINERY.—The defendant having undertaken as agent for plaintiff to sell mining machinery intrusted to it for resale, and having returned some of it to persons from whom it was pur-

chased and received credit therefor, and having in abuse of its trust, commingled the residue of the machinery with its own stock, so that its identity was substantially lost, and having sold it as its own, it may properly be held liable to account as of the date when the property was intrusted to it for resale.

ID.—AGENT BOUND TO UTMOST GOOD FAITH.—An agent is charged with the duty of acting in the utmost good faith for the promotion of the interests of the principal.

ID.—DEMAND BEFORE SUIT FOR ACCOUNTING.—Where an agent has been guilty of a breach of duty in failing to notify the principal of money collected, or has converted the property to his own use, there is no necessity of a demand before suit for an accounting; but where the plaintiff alleged and proved a demand and refusal of the defendant to account, the requirements of the law were satisfied.

ID.—STATUTE OF LIMITATIONS—PLEADING—EXPRESS TRUST—CONCEALED BREACH.—The statute of limitation applicable to an accounting between an agent and the principal is section 343 of the Code of Civil Procedure, and cannot be invoked if not pleaded; nor could the statute begin to run, the relation being one of express trust, where no knowledge of a repudiation of the trust relation was brought home to the knowledge of the principal, but the breach of trust was concealed from him.

ID.—VALUE OF PROPERTY INTRUSTED—ESTOPPEL—SUPPORT OF FINDING.—Upon general principles of equity, the defendant should be estopped from contending that the value of the property intrusted to it for resale was less than the amount paid therefor by plaintiff to defendant, and the evidence is held to sustain a finding that there was no difference in value.

ID.—COSTS—PERCENTAGE IN SAN FRANCISCO.—In a litigated case in San Francisco, the plaintiff recovering is entitled to the percentage allowed by the statute applicable thereto which is still in force.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial, and from an order refusing to retax costs. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

E. B. Young, for Appellant.

Charles W. Slack, for Respondent.

BURNETT, J.—The complaint alleges that on or about June 17, 1897, the plaintiff and the defendant entered into

a contract whereby the defendant agreed to sell to the plaintiff a five-stamp mill with certain accessories for the sum of \$5,000; that thereafter by agreement the price was increased to \$5,050; that thereafter, on or about the twenty-third day of September, A. D. 1897, the defendant offered to deliver the said property to the plaintiff and he accepted the said offer, and thereupon he paid defendant the sum of \$5,050. There is no denial of these allegations. It is further alleged that on or about October 4, 1897, the defendant agreed with the plaintiff to resell for him the said property and to account for the sales as they were made, and thereupon defendant took possession of the property for said purpose. The answer admits the agreement, but denies that the defendant took possession for the purpose of resale, but alleges that it always had possession, and that no part of the property was ever delivered to plaintiff but had been left with defendant at the request of plaintiff. The finding of the court in that behalf was in accordance with the foregoing allegations and admissions of the answer.

It is further alleged in the complaint that the defendant resold different portions of the property for sums exceeding \$3,500, and appropriated to its own use the remainder of the property; that the defendant has never accounted to the plaintiff for the property or the proceeds of the sales thereof, nor has the defendant paid to the plaintiff any of the proceeds except the sum of \$3,500; and that on or about April 4, 1902, the plaintiff demanded an accounting of defendant, and the prayer is for an accounting for the property and the proceeds of the sale.

The answer denies that the defendant resold any of the property for any sum in excess of \$3,500; denies that it appropriated to its own use any of the property; denies that it has never accounted to the plaintiff for the property or the proceeds of the sales thereof; admits the demand for the accounting, denies its refusal to account, and alleges the payment to plaintiff of all the proceeds of the sales of the property. The finding of the court on this issue is "that the defendant resold a portion of the said property; but the defendant is unable to account for the moneys received from such resales; and that the defendant has never accounted to the plaintiff for the said property, or for the proceeds of the resales thereof. That the defendant, on or about the said

fourth day of October, 1897, appropriated to its own use all of the said property; and that the value of said property at said date was and is the sum of \$4,040. That the defendant has not paid to the plaintiff any of the proceeds of the resales of the property except the sum of \$3,500, paid as follows: \$1,000 April 6, 1899, \$1,000 Aug. 10, 1899, \$500 Nov. 24, 1899, and \$1,000 April 21, 1900." There is also a finding that the defendant failed and refused to account to plaintiff. The court also finds that the action is not barred by the statute of limitations as pleaded by defendant, and the judgment is in favor of plaintiff for the sum of \$1,417.57.

The judgment is manifestly just and finds ample support in the evidence. The zeal and sincerity with which they are urged, however, are probably justification for the specific consideration of the points made by appellant.

It is contended that the evidence is insufficient to justify the decision and that said decision is against the law and the evidence. The argument is that the action is for an accounting, and the court finds the property was converted by appellant and bases its judgment upon the rule of damages for conversion, as provided in section 3336, Civil Code, whereas, it is urged, the evidence does not justify the conclusion that the appellant appropriated the property to its own use.

Both parties agree that the action is for an accounting. The gist of such an action is the failure to account. The finding that the defendant "appropriated to its own use all of the said property" is obviously broader than the allegation of the complaint "*and has appropriated to its own use the remainder of the said property,*" but this is immaterial, and the contention of the insufficiency of the evidence to show any conversion is of no consequence in view of the fact that a cause of action for an accounting is sufficiently pleaded and supported by the evidence, and the allegation and finding of conversion may be disregarded as surplusage. The allegation of an appropriation of the property by the defendant was unnecessary and did not change the action into one of tort. (*State v. Chedwick*, 10 Or. 423; *Segelken v. Meyer*, 94 N. Y. 583.) But, as pointed out by respondent, there is abundant evidence to show—if it be deemed important—that the property was converted by appellant.

The evidence satisfies the requirement of the rule laid down in *Steele v. Marsicano*, 102 Cal. 666, [36 Pac. 920], to the

effect that "in order to charge the defendant with the conversion of the plaintiff's goods, he must be shown to have done some act implying the exercise or assumption of title, or of a dominion over the goods, or some act inconsistent with the plaintiff's right of ownership, or in the repudiation of such right." It is not apparent what other act could have been done by appellant in respect to the property that would more fully carry with it the implication of the assumption of title to and dominion over the property, or repudiation of any right of respondent in and to the ownership of said property. The defendant having undertaken as an agent to sell the property for plaintiff, having returned some of the property to the persons from whom it was purchased and receiving credit therefor, and having placed the remainder with its own stock so that its identity was substantially lost, and having used and sold the property as its own without keeping any account of its transactions, is hardly in a position to urge that it should not be held liable for the value of the machinery as of the date of October 4, 1897, when it agreed in writing to dispose of the machinery as rapidly as possible and report the sales as they were made. As an agent, appellant was charged with the duty of acting in the utmost good faith for the promotion of the interests of the principal. Its conduct was hardly compatible with the requirements of the elemental principles of its trust and the canons of honorable dealing.

Section 2228, Civil Code, provides that: "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." And the doctrine is universally recognized that "the paramount and vital principle of all agencies is good faith, for without it the relation of principal and agent could not very well exist. So sedulously is this principle guarded, that all departures from it are esteemed frauds upon the confidence bestowed." (1 Am. & Eng. Ency. of Law, p. 1071.)

For further illustrations of the same doctrine we may cite: *Sterling v. Smith*, 97 Cal. 343, [32 Pac. 320]; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, [53 Pac. 410], and *Calmon v. Sorraile*, 142 Cal. 638, [76 Pac. 486]; *Burke v. Bours*, 92 Cal. 108, [28 Pac. 57].

In view of the foregoing, the trial court, with some justification at least, might have charged the defendant with the full price paid for the machinery by the plaintiff, but assuredly, the corporation could not expect a more generous concession than the reduction from the price of twenty per cent which was made by the court. The defendant, being unable to account for the property and its proceeds, could not complain at the action of the court in taking \$4,040 as the amount due October 4, 1897, and, according to the well-settled rule of partial payments, computing interest and applying the payments made, and thus determining that the indebtedness of defendant was as found in the judgment. (*Estate of Den*, 35 Cal. 692; 16 Am. & Eng. Ency. of Law, p. 1036.)

Appellant's contention that a demand for the delivery of the property was required is likewise destitute of any merit. The appellant answers its own contention by asserting that "This is *not* an action for *conversion* but one for an accounting." But even if it were an action for conversion, under the facts and circumstances of the case no demand would be required. This is apparent from the cases cited by appellant: *Wood v. McDonald*, 66 Cal. 547, [6 Pac. 452], *Remy v. Olds*, 88 Cal. 537, [26 Pac. 355], and *Merrill v. Merrill*, 95 Cal. 334, [30 Pac. 542]. In the *Wood* case it is said: "Proof of any circumstance which would satisfy a jury that a demand would be unavailing—as a refusal by defendant to listen to one, or a statement in advance that he will not deliver—will be sufficient to excuse proof of a demand. If there is proof that defendant had converted the property before or independent of the demand, such conversion—the material matter—will render the defendant liable."

"If there is an actual conversion no demand need be made." (Cooley on Torts, p. 530.)

"Where, however, the agent has been guilty of a breach of duty, as where he fails to render an account of sales or to notify the principal of the collection of money within a reasonable time or has converted the property to his own use, there is no necessity for demand before suit." (1 Am. & Eng. Ency. of Law, p. 1092.)

As before seen, the action was for an accounting, and plaintiff alleged and proved that he demanded that an account be made to him by defendant and its failure and refusal to do so. In that behalf he satisfied the requirements of the law.

In support of its plea of the bar of the statute, appellant says: "If the facts stated in the complaint constitute a case of wrongful conversion of personal property by appellant, . . . then the claim of respondent is barred by the statute of limitations, because the conversion is found to have been committed on the fourth day of October, 1897, and his suit was instituted on the twenty-ninth day of April, 1902." But it is a sufficient answer to say that the wrong sections of the Code of Civil Procedure were pleaded by defendant, viz.: Section 337 and subdivision 1 of section 339. The section applicable to conversion is section 338, subdivision 3 (*Lowe v. Ozmun*, 137 Cal. 257, [70 Pac. 87], and *Horton v. Jack* (Cal.), 37 Pac. 652); and the section applicable to causes of action for an accounting is section 343. (*West v. Russell*, 74 Cal. 544, [16 Pac. 392].)

But again, there was an express trust created by the transaction between the parties, and the statute of limitations would not begin to run until there was brought home to plaintiff knowledge of the repudiation of the trust or the violation of its terms on the part of defendant.

In *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, [53 Pac. 410], it is said: "The statute of limitations cannot be successfully invoked. Reynolds was acting in a fiduciary capacity. Such of his acts as resulted in loss to the corporation were concealed breaches of trust. The statute of limitations would not begin to run in his favor, so as to enable him to escape the results of an accounting, until after knowledge by his principal of his derelictions. In this case the accounting was promptly demanded after discovery." And likewise it may be said here that plaintiff acted speedily and without unnecessary delay.

In 19 American and English Encyclopedia of Law, page 187, it is declared: "As long as the relation of principal and agent continues, there is a privity between the parties, and there is nothing to set the statute in operation as to claims and accounts between them. The position of the agent is that of a trustee, and claims against him are governed by a rule similar to that controlling trustees. The assertion by the agent of an adverse right or his failure to discharge a duty to his principal arising out of his agency does not set the statute in motion until called to the attention of the prin-

cipal or until he knows, or with reasonable diligence might have known thereof."

In 2 Perry on Trusts, section 863, the rule is stated as follows: "As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Against an express and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the *cestui*. . . . The trustee must clearly repudiate the trust and assume an adverse position, with notice to the *cestui*, before the statute can begin to run." But the principle is too well established to need further citation of authorities.

In its closing brief appellant seems to have abandoned all the contentions of the opening brief and to have planted itself firmly upon the proposition that "there is no evidence to support Finding 6 of the trial court 'that the value of the said property at the last-mentioned date (Oct., 1897) was and is the sum of \$4,040,' nor the judgment of said court that respondent recover from appellant a sum of \$1,417.57, or any sum." The argument in which appellant indulges is more curious than convincing. Upon general considerations of equity it would seem that appellant should be estopped from contending that the property was worth less than \$5,050, the amount paid for it by respondent. But there is evidence to sustain the finding within the rule prescribed by section 2237, Code of Civil Procedure, that "a trustee who uses or disposes of the trust property contrary to section 2229 may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest." The testimony of the president of the corporation is sufficient support for the finding of the court. He said that the machinery was sold to Mr. Allsopp for the fair market value; and when asked if that was not the value at the time it was taken back for resale his answer was, "I could not say positively. I don't know as there was any particular difference. I don't think there was any appreciable difference." There are other circumstances justifying the court's conclusion, but the foregoing is sufficient.

In addition to the appeal from the judgment and order denying the motion for a new trial, there is also an appeal

from an order of the court refusing to strike from the cost bill the amount of \$20.88, percentage allowed under an act of the legislature entitled "An Act to regulate fees in the City and County of San Francisco," Statutes of 1865-66, page 66. In the recent case of *Doyle v. Eschen et al.*, *ante*, p. 55, [89 Pac. 836], we had occasion to consider the question whether the provision involved herein is still in force, and we reached the conclusion that it had not been repealed. We see no reason to modify the views therein expressed.

The judgment and orders are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 288. Third Appellate District.—March 19, 1907.]

CHARLES SHIVELY, Respondent, v. EUREKA TELLURIUM GOLD MINING CO., Defendant, Appellant.
S. W. POWELL, Administrator, etc., Intervener, Appellant.

CORPORATIONS—RIGHTS OF DIRECTORS—ACTION ON QUANTUM MERUIT—
FORMER JUDGMENT INVALIDATING NOTES NOT A BAR.—A judgment in a former action against a corporation based upon notes issued to the directors of the corporation by their own votes, which were adjudged invalid and were canceled, in which the indebtedness of the corporation upon the consideration of the notes was not passed upon or adjudicated, is not a bar to a subsequent cause of action on behalf of the directors, based upon an account stated, and upon a *quantum meruit* for services rendered and for money loaned and money expended by them for the use and benefit of the corporation.

ID.—TIME OF ACCOUNT STATED—IMPLIED AGREEMENT—SUPPORT OF FINDING.—An account stated by the corporation in favor of one who afterward became its director, for services actually performed and money advanced prior thereto, is valid and binding. No express agreement was required to be shown, but a finding in favor of the account stated is sufficiently based upon an implied agreement.

ID.—INCURRING OF JUST INDEBTEDNESS BY DE FACTO DIRECTORS.—The incurring of just indebtedness against the corporation by *de facto* directors, cannot be impeached by showing an irregularity in their election.

ID.—SERVICES RENDERED AND MONEY ADVANCED BY DIRECTORS—REGULARITY OF ELECTION—SUPPORT OF FINDING.—If there is any difference in the rule that the directors of a corporation may sue the corporation in *quantum meruit* for money expended and services performed by each in good faith for the use and benefit of the corporation, as applied to *de jure* and *de facto* directors, it is sufficient to declare that a finding that the directors were regularly elected is supported by sufficient evidence to make it binding upon this court.

ID.—SUFFICIENCY OF EVIDENCE—ABSENCE OF PREJUDICIAL ERROR.—*Held*, that the evidence is sufficient to support all of the findings made in favor of the plaintiff, and the directors, his assignors, and against the defendant corporation and the intervener, upon the claim of fraud and conspiracy of the directors; and that there is no prejudicial error in the rulings of the court.

APPEAL from an order of the Superior Court of Shasta County denying a new trial. John F. Ellison, Judge.

The facts are stated in the opinion of the court, and in the opinion rendered upon a former appeal in 129 Cal. 293.

Edward Sweeney, and Robinson & Robinson, for Corporation, Appellant.

Campbell, Metson & Campbell, and S. D. Woods, for Intervener, Appellant.

Charles A. Garter, and W. S. Tillotson, for Respondent.

BURNETT, J.—This case has been before the supreme court on a former appeal. It is reported in *Shively v. Eureka etc. Co.*, 129 Cal. 293, [61 Pac. 939], to which we refer for a statement of the issues presented by the pleadings. The case was reversed because of the insufficiency of the allegations of the complaint in intervention and of the corresponding finding to show a personal indebtedness of Ludlum and Swezey on account of the alleged assessment of their stock in the defendant corporation. But in response to plaintiff's prayer that judgment be rendered for him on the findings, the supreme court declared: "The findings, however, would not justify a finding for the plaintiff. A fraudulent conspiracy is alleged in the complaint in intervention, and, in the absence of findings disposing of these issues, we would not

be justified in rendering judgment for the plaintiff." The decision of the supreme court eliminated the question of the indebtedness of Ludlum and Swezey, two of plaintiff's assignors, to the corporation, and also determined the authority of the intervener to appear and defend for the corporation. Subsequently the intervener died, and her administrator, Powell, was substituted. Defendant corporation filed amended pleadings, and at the second trial the defendant and intervener stood on common ground. Plaintiff also withdrew from the consideration of the court the fourth cause of action, involving the sum of \$8,973.63 for moneys advanced by Watson D. Swezey for the use and benefit of the corporation.

1. Among the allegations of the complaint in intervention and of the answer of the corporation upon which great emphasis is placed is "that prior to the commencement of this action on the — day of —, 1896, in an action brought in the superior court of said Shasta county by the plaintiff against the defendant upon the same alleged causes of action designated in plaintiff's amended complaint 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, a judgment was duly given and made upon the merits, fully settling and adjusting all matters and things embraced in said alleged causes of action in favor of said defendant and against said plaintiff."

In reference to this plea in bar it is respondent's contention that it is not available "because of a want of identity of parties and of the issues in the two actions and because the matters actually adjudicated in the former action are not presented for adjudication in the present action." The court found in favor of respondent, holding that the parties and the issues were different. But it is apparent that if either the parties or the issues were different the finding must stand. The parties were the same except that John J. Atherton, the owner of fifty shares of capital stock, was intervener in the former, and Mrs. B. C. Northrup, the owner of another fifty shares, was intervener in the present action. But appellant contends that they both appeared in the respective actions as intervening stockholders and defended for the corporation; and, therefore, they appeared in the same capacity and for the same purpose, and hence in legal contemplation both actions must be considered as between the same parties.

In *Wickersham v. Crittenden*, 110 Cal. 332, [42 Pac. 893], it is said: "That an action brought by a stockholder to recover money paid to the president of the corporation on account of salary is brought for the account of the corporation, and not for the individual benefit of the stockholder; and whatever would have estopped the corporation from recovering a judgment against its president is equally a defense against the stockholder." To the same effect are *Fox v. Hale & Norcross Min. Co.*, 108 Cal. 475, [41 Pac. 328]; *Chetwood v. California National Bank*, 113 Cal. 414, [45 Pac. 704].

Although the complaint in intervention does not purport to be for the benefit of the corporation, yet the cases cited seem to go to the extent of holding that the corporation is the real party in interest in each case. If so, there would necessarily be identity of parties. But this becomes immaterial in view of the conclusion that is unavoidable upon the vital question as to whether the same matter was adjudicated and the same facts involved in the former action that arise in the action before us.

The effect and scope of a judgment are so clearly set forth in the provisions of the Code of Civil Procedure as scarcely to need judicial explanation. The difficulty remains, however, of applying the law to the particular facts as they are developed in each case. Subdivision 2 of section 1908, Code of Civil Procedure, is as follows: "In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

As to how we shall view the judgment in section 1911 we have this rule provided: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

At the former trial, after the evidence was all introduced, as stated in the findings, "plaintiff moved the court to be allowed to dismiss said action on behalf of plaintiff, without prejudice, which motion was by the court allowed and granted, and neither plaintiff nor defendant introduced any evidence to sustain the allegations of the respective answers to inter-

vener's complaint." Appellant insists that there was no judgment of dismissal, but that question is unimportant, because it was treated by all parties as a dismissal and none of the allegations of the complaint as such was considered or determined by the court.

However, notwithstanding the dismissal of plaintiff's action without objection, the court proceeded—no one contesting its right so to do—to hear and determine certain issues raised by the complaint in intervention and the answers of plaintiff and defendant thereto. The court, however, did not determine all these issues and, as before seen, the only evidence offered was on behalf of the intervenor. The court did determine that John J. Atherton was the owner of fifty shares of stock and was interested in the result of the action; that at all the times in the amended complaint mentioned, and long prior thereto, the directors of said corporation were W. D. Swezey, J. Scott Ludlum, Anna M. Ludlum, George C. Jones, and Peter Scherer. That the question and issue of the consideration of the promissory notes in the amended complaint mentioned was withdrawn from the consideration of the court and no evidence introduced under the allegations thereof; that paragraphs 4, 5 and 6 of the complaint in intervention were withdrawn from consideration. Paragraph 4 related to the charge of conspiracy; paragraph 5 to fraudulent acts of Swezey and Ludlum in carrying out the conspiracy, and paragraph 6 charged that the latter had agreed to work and operate the mine at their own cost and expense. The foregoing paragraphs were substantially in the same language as the corresponding allegations in the present complaint in intervention. The court further found "that said Ludlum, Jones and Swezey did by their own votes as directors of said corporation cause the notes mentioned in the amended complaint to be issued to themselves, and did take part in the proceedings authorizing said notes to be issued to them by said Board of Directors, and did each of them vote therefor and as said directors did deal with themselves as individuals in issuing said notes, and each of them, save and except the notes mentioned in Counts 1 and 10 of said amended complaint, which were issued to persons not directors of said corporation." And it was further found that said notes were not assigned in good faith and for a valuable consideration, but for convenience in collection, and as conclusions of law it was declared that said

notes—except the two mentioned—and which, it may be remarked, are the basis for two of the counts in the present action, viz., the note to plaintiff for \$75, and to one E. A. Reid for the sum of \$35—“are illegal, null and void. That the same be surrendered and canceled.” How there can be any controversy as to what was adjudicated in that action seems almost incredible in view of the language used. The only question determined is that the notes, having been issued by the directors to themselves, were without validity and were assigned for convenience of collection and they were directed to be canceled. And the record shows that the notes were subsequently canceled. But the notes were simply written evidence of an indebtedness, and the effect of the judgment was to remove from consideration the written testimonial of the obligation of the corporation to the payees. The vital questions involved herein as to the existence of the indebtedness, whether the services were performed and the money advanced for the use and benefit of the corporation as set out in the complaint, and the defense of fraud and want of consideration as exhibited in the present complaint of intervention, were expressly left undetermined and they were not affected in any way by the judgment aforesaid. The court found in the present action “that all of the causes of action were founded upon the said promissory notes, while in the present action none of the causes of action is based or founded on any promissory note (except the first and second causes of action stated in the present complaint, which are the subject of subdivisions one and two of the paragraph). The third cause of action is upon an account stated. The fifth cause of action is upon *quantum meruit* for services rendered. The sixth cause of action is upon *quantum meruit* for money loaned and advanced, etc. The seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth causes of action are for moneys loaned, advanced, and expended for the use and benefit of the corporation defendant.” The evidence supports these findings and it must follow that the former judgment is no bar. Indeed, were it not for the character and ability of counsel who urge it, the contention of appellants to the contrary would scarcely merit the courtesy of serious attention. The decisions of our supreme court wherein are discussed the scope and effect of judgments and of the aforesaid provisions of the Code of Civil Procedure are quite numerous and are

collated by counsel for the respective parties. Among them, as fairly illustrative of the principle involved, we cite the following: *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, [50 Pac. 277], in which Mr. Justice Harrison, with usual perspicuity, states the rule in this manner: "The doctrine of *res adjudicata*, or estoppel by reason of a former judgment, rests upon the principle that a cause of action which has been once determined upon its merits by a competent tribunal, between parties over whom that tribunal had jurisdiction, cannot afterward be litigated by them in another proceeding, either in the same or a different tribunal, and it is immaterial whether such cause of action is of equitable or of legal cognizance, or whether the judgment was given in a common-law court or was rendered by a court of equity. . . . But, if the judgment in either tribunal is rendered for a reason or upon a ground not involving the merits of the controversy, no such effect can result." (*Pyle v. Piercy*, 122 Cal. 383, [55 Pac. 141]; *South San Bernardino Co. v. San Bernardino Nat. Bank*, 127 Cal. 245, [59 Pac. 699]; *Beronio v. Ventura Co. Lumber Co.*, 129 Cal. 232, [79 Am. St. Rep. 118, 61 Pac. 958]; *Freeman v. Barnum*, 131 Cal. 387, [82 Am. St. Rep. 355, 63 Pac. 691]; *Moore v. Russell*, 133 Cal. 297, [85 Am. St. Rep. 166, 65 Pac. 624].) It is manifest from the provisions of the code and the foregoing decisions that a judgment is conclusive between the parties and privies only as to the facts actually considered and determined or which are necessarily involved in the judgment, and unless those facts are controlling in a subsequent suit the plea that the action is barred by the former judgment must be rejected.

Appellant seems to rely largely upon *Woolverton v. Baker*, 98 Cal. 628, [33 Pac. 731], and *Bingham v. Hearnay*, 136 Cal. 175, [68 Pac. 597]. In those cases there is some general language used apparently affording support to appellants' contention, but, of course, the facts of each case must be considered to determine what was really decided. The decision in the *Woolverton* case, *supra*, is put upon the ground that the cause of action was the same in both actions. That the controlling question at issue determined in the former and involved in the subsequent proceeding was the title to the land, and, as stated in the syllabus, it is correctly held that "In an action to compel a reconveyance of land alleged to have been conveyed to one of the defendants upon the sole consideration

and condition that the grantee would apply a sufficient portion of the rents for her support and maintenance during life, on account of the alleged breach of such condition, a judgment in a former action between the same parties, which sets up the same conveyance and alleged that it had been made upon the sole consideration that the grantee should hold the same in trust for her, and that the rents, issues and profits should be applied in providing for her support and maintenance during life and that they had not been so applied, and sought a judgment that she was the owner of the premises as against the defendants, and that the premises be reconveyed to her, in which action the court adjudged that the defendants as against the plaintiff were the owners of the land in fee simple, free and clear of any and all trusts, exceptions, limitations and conditions set forth and alleged in said complaint constitutes a complete defense and bar to the new action by way of estoppel." It would deprive a judgment of almost all significance to hold to the contrary.

The difference between the Bingham case, *supra*, and the one at bar is apparent from the following statement of the court: "The former action was between the same parties. It involved the same subject matter—the contract concerning the sale of land. The court in the former action had declared the contract valid, and that the defendant had the right to have it foreclosed and to be restored to the possession of the land. The present action is brought for the purpose of having the same contract rescinded and to recover the payments made thereunder." It is true that into the second action the specific allegation of fraud for the first time was injected by the plaintiff, who was defendant in the first action, but this could not change the rule that the validity of the contract having been determined it could not again be brought to judgment by the same parties. We are satisfied that the claim of appellants in relation to the former judgment cannot be maintained.

2. Appellants attack the finding of the court upholding the allegations in the fourth count of the complaint in reference to the stated account of George C. Jones. There was evidence, however, to show that the account had been stated and agreed to by the parties, but the court found that subsequently to the statement of the account a payment was made which was not credited, "but that the said account stated was for

services actually performed and for money actually advanced to the said defendant corporation, by the said George C. Jones; and when said sums were so advanced and said services so performed, and when said account was stated, neither the said George C. Jones or any of the persons alleged and complained of by the defendant and intervener, as confederates of the said George C. Jones, was a director of the said defendant corporation." Without setting out the evidence, it is sufficient to say that an examination of the record discloses support for this finding. No express agreement was required to be shown. It might be implied. (*Hendy v. Murch*, 75 Cal. 566, [17 Pac. 702]; *Mayberry v. Cook*, 121 Cal. 588, 54 Pac. 95].)

3. Appellants also insist that the court erred in finding that Ludlum, Swezey, Anna Ludlum and Jones were elected directors for the reason that they were not elected at a regular meeting and no notice was given of said meeting. It is admitted that they were *de facto* officers. And assuming for the sake of argument that they were irregularly elected, it cannot avail appellants, because the act of incurring a just indebtedness by persons who are *de facto* directors cannot be impeached by showing an irregularity in their election. (*Barrell v. Lakeview Land Co.*, 122 Cal. 129, [54 Pac. 594].) In the Barrell case also it is held that "A corporation will not be permitted, after allowing a person to act as its secretary and causing him to authenticate its records, to object to the regularity of his appointment, or to repudiate an obligation signed by him as secretary under authority from its board of directors."

It is claimed that the rule does not apply to money advanced by the directors. In the language of appellants: "*De facto* officers can bind the corporation so far as third persons are concerned, but they cannot recover upon any claim on their part." It seems, however, from the decisions that the directors may bring and maintain actions in the form of *quantum meruit* against the corporation for money expended and services performed in good faith for the use and benefit of the corporation, although they may not execute or join in the execution of a promissory note to themselves which will bind the corporation. (*Seeley v. San Jose I. M. & L. Co.*, 59 Cal. 22; *Santa Cruz R. R. Co. v. Spreckels*, 65 Cal. 193, [3 Pac. 661, 802]; *Graves v. Mining Co.*, 81 Cal. 303, [22 Pac.

665]; *Pauly v. Pauly*, 107 Cal. 8, [48 Am. St. Rep. 98, 40 Pac. 29].) The rule is stated clearly in the syllabus of *Schnittger v. Old Home Cons. Min. Co.*, 144 Cal. 603, [78 Pac. 9], as follows: "A director of a corporation, though bound to the utmost good faith, and forbidden to take part in any transaction concerning his trust in which he has an adverse interest, is not precluded from dealing directly with the corporation, and may become its creditor, and take from it a mortgage or other security, and may enforce it like any other creditor, subject always to severe scrutiny. A violation of his duty as a trustee may render the transaction voidable, but it is not *ipso facto* void. The mere fact that the creditor was a director of the corporation does not render the transaction fraudulent." If there should be any difference in this respect between *de facto* and *de jure* directors, it is sufficient to declare that there was some evidence to show the regularity of the election in question, and hence the trial court's determination that they were directors of the corporation is binding upon us.

4. The finding that "the escrow agreement between Watson D. Swezey and J. Scott Ludlum and the stockholders of the defendant did not provide that the said Ludlum and Swezey should at their own cost and expense operate the mine of defendant" is also vigorously assailed. It was contended at the trial that the agreement provided that they should do this work at their own expense. But while Mr. Ludlum was on the stand he identified as the original agreement a document which contained no such provision. A similar provision was, however, afterward attached and signed by Swezey, but according to his testimony it was not to be binding unless ratified and signed by Ludlum, which Swezey's deposition shows was never done. There is at least evidence to support this as well as all other findings of the court.

5. The claim of fraud and conspiracy was passed upon by the court and deliberately found against defendant and intervenor. The same learned judge presided at the three trials to which reference has been made, and he had rather exceptional opportunities to weigh the evidence and determine the credibility of the witnesses. It is true, as suggested by appellants, that it is usually difficult to establish fraud clearly, and that positive and express proof is not required; but it must be remembered, also, that charges of this character are easily made, and they often have no foundation in fact. Surmise is

not evidence and something more than suspicion is required as the basis for judicial action. We have considered the circumstances declared by appellants to be badges of fraud, and we are satisfied that they do not present sufficient reason for disturbing the findings of the court against appellants.

6. During the progress of the trial exceptions were taken by appellants to certain rulings of the court. Most of them present the same questions hereinbefore considered, and they do not require further notice. I think there is merit in some of the objections, however, but the rulings would not justify a reversal of the judgment. For instance, this question was asked Mr. Ludlum: "During the time you acted and performed services for the company as you have testified, what was the reasonable value of those services?"

"Mr. Woods: We object to that upon the ground that it is not shown that he knows."

He ought to have been interrogated more fully as to his knowledge of the value of such services, but it is doubtful whether the objection raises the question of his competency to testify. Besides, it is a matter addressed largely to the discretion of the trial court, and we cannot say there is no justification for the inference that he had shown himself qualified.

Again, the same witness said: "I requested the board of directors on Jan. 1, 1895, that they have *stated accounts* made of the indebtedness that was against the company at that time of *which this was one*."

"Mr. Robinson: We move to strike this out, your Honor, on the ground that an account stated is a conclusion of law."

"The Court: I will deny the motion."

In my opinion, the motion should have been granted; but the ruling did no harm, as the conclusion must necessarily follow from the facts stated.

We find no prejudicial error, and the order denying the motion for a new trial is affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 15, 1907.

[Civ. No. 841. First Appellate District.—March 20, 1907.]

J. P. WOOD, Appellant, v. J. A. THOMPSON, Respondent.

VENUE OF ACTION—SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY REAL ESTATE—PLACE OF COMMENCEMENT.—An action to compel the specific performance of a contract to convey mining claims situated in another county may be brought in the county of the residence of the defendant. It is not an action "for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate," required by the constitution to "be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated."

ID.—CONSTRUCTION OF CONSTITUTIONAL PROVISION—LIMITATION UPON JURISDICTION OF SUPERIOR COURT.—The constitutional provision limiting the place of commencement of certain enumerated actions, being a limitation upon the general jurisdiction of the superior court, is to be strictly construed; and its prohibition must be confined to the actions enumerated therein.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Vincent Neale, for Appellant.

De Voto & Richardson, for Respondent.

COOPER, P. J.—This action was brought in the city and county of San Francisco to compel the specific performance of a contract by defendant to convey to plaintiff an undivided one-eighth interest in certain mining claims known as "King Solomon's Mines," situated in Siskiyou county, either by the execution of a good and sufficient deed, or by a decree giving to plaintiff shares of the stock of the Fidelity Investment and Development Company, a corporation, sufficient to represent the one-eighth interest. A demurrer was sustained to the complaint, without leave to amend, upon the ground that the action should have been commenced in Siskiyou county, and that the superior court of San Francisco had no jurisdiction.

In this the court erred. The superior courts are courts of general jurisdiction, and their process extends to all parts of

the state unless expressly limited by the statute or the constitution. Our constitution contains the following express limitation upon which the defendant relies: "All actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated."

The above provision, being a limitation upon the general jurisdiction of the superior courts, is to be strictly construed. It prohibits the commencement of certain enumerated actions, but its prohibition must be confined to the actions enumerated therein. (*Miller & Luz v. Kern Co. Land Co.*, 140 Cal. 132, [98 Am. St. Rep. 63, 73 Pac. 836].) Measured by the above rule, the prohibition does not extend to this case. The purpose of the action is not to recover possession of, quiet title to, or enforce a lien upon "King Solomon's Mines." It is to enforce the specific performance of a contract. If the court should determine that the plaintiff is entitled to a specific performance by a conveyance of an undivided one-eighth interest, that would not of itself entitle the plaintiff to the possession of the real estate.

In *Le Breton v. Superior Court*, 66 Cal. 27, [4 Pac. 777], it was held that the quoted provision of the constitution has no application to an action for the settlement of a trust in regard to real estate.

In *Beach v. Hodgdon*, 66 Cal. 187, [5 Pac. 77], it was held that the provision did not apply to a creditor's bill to set aside a conveyance of real estate on the ground of fraud.

If the superior court has jurisdiction to set aside a conveyance of land situate in another county, it certainly would have jurisdiction to compel a conveyance of such land. Nor would such action be one for the recovery of possession of real estate.

The order is reversed.

Kerrigan, J., and Hall, J., concurred.

[Civ. No. 320. Second Appellate District.—March 22, 1907.]

TOGNINA RIGHETTI, Appellant, v. ORAZIO RIGHETTI,
Respondent.

PROMISSORY NOTE—WAIVER OF INTEREST AFTER MATURITY—EXECUTED ORAL AGREEMENT.—An executed oral agreement between the owner of a note and the payee, upon sufficient consideration, to waive the payment of interest thereon after maturity, had the effect to change the stipulation of the note as to such interest.

ID.—CONDITIONAL DEPOSIT OF MONEY IN BANK—EXTINGUISHMENT NOT EFFECTED.—A deposit of money in bank for the purpose of extinguishing a note under the provisions of section 1500 of the Civil Code must be unconditional, and must have the effect to make the deposit the property of the person to whose credit it is placed; and a deposit of money made conditionally upon the surrender of the notes is insufficient to extinguish the obligation of the note for which the deposit was made.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order denying a new trial.
E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

S. V. Wright, and Albert Nelson, for Appellant.

W. H. Spencer, and William M. Shipsey, for Respondent.

ALLEN, P. J.—Action upon a promissory note. Judgment for defendant. Appeal by plaintiff therefrom, and from an order denying a new trial.

The findings of the court—all of which, except as hereinafter noted, have some support in the evidence—and the evidence in the record together establish the following facts: The note sued on was executed by defendant as consideration for the purchase of an interest in a business theretofore conducted by plaintiff's husband and defendant. Before its maturity the husband was adjudged a bankrupt, and a trustee in bankruptcy instituted proceedings to have the note declared a part of the estate of the bankrupt, for its possession or the value thereof, and procured an injunctive order that the plaintiff be restrained from selling or disposing of the note pending the

action. During all of the period involved in this action the husband of the plaintiff acted as her agent with full authority in the premises. At the maturity of the note defendant notified the husband as such agent that he intended to deposit the money in bank in extinguishment of the note. Thereupon, it was agreed that if the defendant would retain the money until the proceedings instituted by the trustee against the wife were settled, no interest would be charged thereon after maturity. Acting upon this agreement, the defendant retained the money until such proceedings were settled, except that for the purpose of procuring an adjustment with the creditors of the husband, who was then in jail upon a charge of fraud, defendant advanced \$1,800, which was received as part payment of such note, which sum, together with \$50 paid as interest, constituted the only payments thereon; and a balance remained unpaid of \$296.70. After the dismissal of the action by the trustee, defendant offered to pay this balance, but it was refused and a claim made that a much larger sum was due. Through threats and by duress the husband of the plaintiff procured a check from defendant for \$600 and a new note for \$300 in settlement of the balance of \$296.70. This check and the old note were left in escrow, the latter to be surrendered upon payment of the check. The defendant stopped payment of the check, and through his attorneys deposited \$296.70 in the Commercial Bank of San Luis Obispo, to be paid plaintiff or her agent upon surrender of the old note and the note for \$300. This plaintiff declined to accept.

It is contended that the agreement waiving interest, being oral, could not have the effect to change the written contract of the parties. But while oral, it was fully executed. Under the terms of the injunctive order, the plaintiff had a right to enforce collection and the defendant, under the code, a right to deposit the money in extinguishment of the debt. The oral agreement in relation to the retention of the money and waiver of proceedings to collect, being fully executed, had the effect to change the stipulation as to interest.

It is contended further that the allegations of the complaint in relation to the coercion claimed in procuring the check and note of \$300 are insufficient. In view of the fact that the fruits of the attempted settlement were voluntarily surrendered by plaintiff to defendant upon the trial, further consideration of the questions involved would serve no useful

purpose. We find no evidence in support of the finding that the deposit of \$296.70 was made in the Commercial Bank to the credit either of the plaintiff or her agent. On the contrary, it was deposited in the bank, to be paid conditionally upon the surrender of the two notes. The deposit contemplated by section 1500 of the Civil Code, the effect of which is an extinguishment of the obligation, is an unconditional deposit to the credit of the holder or owner of the obligation. This unconditional deposit was not made, and the court erred in treating the same as an extinguishment of the obligation. In addition to this, had it been a deposit resulting in an extinguishment, the court possessed no right to direct the manner of its distribution, either as to costs or otherwise. Money deposited under the provisions of section 1500, Civil Code, becomes at once the property of the person to whose credit it is placed, and is no more subject to such an order than any other deposit in the bank.

A careful examination of the record discloses no error, other than the one last above referred to. It plainly appears from the record that it was the duty of the court to have entered a judgment in favor of the plaintiff for the \$296.70, the admitted balance unpaid upon the note.

It is, therefore, ordered that the judgment and order be reversed, and the cause remanded, with instructions to the trial court to order a judgment entered in favor of the plaintiff and against defendant for \$296.70, without costs to either party.

Shaw, J., and Taggart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 20, 1907.

[Civ. No. 202. First Appellate District.—March 22, 1907.]

WOOD, CURTIS & CO., Appellant, v. LUKE SEURICH,
Respondent.

CONTRACT—DELIVERY OF GOODS—ACTION FOR BREACH—BREACH BY PLAINTIFF—REFUSAL TO ACCEPT AND PAY—DEFENDANT EXCUSED.—

In an action for damages for breach of a contract to deliver ten carloads of apples, where the contract required the plaintiff to pay on delivery of each carload, and it appears that plaintiff was guilty of an inexcusable breach of the contract on his part by refusal to accept and pay for the eighth carload, such breach of the contract on plaintiff's part excused further delivery by defendant, and plaintiff cannot recover.

ID.—MUTUAL BREACHES OF CONTRACT—GENERAL RULES.—One who refuses or fails to perform the conditions imposed upon him by the terms of a contract, and shows no excuse for such refusal or failure, cannot recover for a breach of contract by the other party; and the refusal of one party to a contract to make payment as called for by the terms of the contract excuses the other party from further performance.

ID.—NOTICE OF RESCISSION FOR BREACH NOT INVOLVED.—The plaintiff who is guilty of a breach on his own part cannot insist that defendant failed to give notice of rescission of the contract on account of the plaintiff's breach. The defense is not predicated upon a rescission of the contract, but rests upon the rule that the plaintiff, who has broken the contract, cannot recover for the defendant's refusal to perform after such breach.

APPEAL from a judgment of the Superior Court of Santa Cruz County, and from an order denying a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

W. T. Jeter, C. M. Cassin, and L. T. Hatfield, for Appellant.

Wyckoff & Gardner, for Respondent.

HALL, J.—Plaintiff brought this action to recover damages for failure of defendant to deliver three carloads of apples under a contract, whereby defendant agreed to deliver to plaintiff ten carloads of Bellflower apples of a specified quality for a specified price, shipment to be made between Septem-

ber 15, and November 15, 1903, at the convenience of the buyer, say one carload per week. Each car to be paid for upon delivery. Plaintiff's claim for damages is for the alleged failure of defendant to deliver the eighth, ninth and tenth carloads of apples.

Defendant pleaded as a defense that plaintiff did not comply with the terms of the contract upon its part in this, that defendant delivered a carload of apples (the fifth carload) on the seventh day of October, 1903, which were in all respects in accordance with the requirements of the contract, but that plaintiff refused to pay therefor until the fourteenth day of November, 1903, and that on the twenty-seventh day of October, 1903, defendant delivered a carload of apples to plaintiff (eighth carload), which were in all respects in accordance with the requirements of the contract, but that plaintiff refused to accept or to pay for the same, and never has paid for the same.

Plaintiff attempted to justify its refusal to pay for the fifth carload upon delivery, upon the ground that they were not of the quality required by the contract, but upon confessedly sufficient evidence the court found that they were of such quality.

Plaintiff also attempted to justify its refusal to accept the eighth carload, upon the ground that they were not of the quality stipulated for by the contract, but the court also, upon confessedly sufficient evidence, found that they were of such quality.

The eighth carload was tendered on the twenty-seventh day of October, 1903, and as the evidence of plaintiff discloses was rejected after inspection by plaintiff upon the alleged ground that the apples were not of the quality called for by the contract. As we have just said, the court found upon sufficient evidence that the apples were of the quality called for by the terms of the contract. This justified the finding or conclusion of the court that defendant was excused from further performance by the defaults and failures of plaintiff.

"One who refuses or fails to perform the conditions imposed on him by the terms of a contract, and shows no excuse for such refusal or failure, cannot recover for a breach of the contract by the other party." (11 Century Digest, sec. 1207, citing *The Alida*, 12 Fed. 343; *Baird v. Evans*, 20 Ill. 30; *Bishop v. Newton*, 20 Ill. 175; *Schoonover v. Christy*, 20

Ill. 426; *Heaston v. Colgrove*, 3 Ind. 265; *Morton v. Kane*, 18 Ind. 191; *Smith v. Cedar Rapids & M. R. Co.*, 43 Iowa, 239; *Golding v. Petit*, 20 La. Ann. 505; *Coates v. Sangston*, 5 Md. 121; *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb. 186, [7 N. W. 737]; *Chicago B. & Q. R. Co. v. Cochran*, 42 Neb. 531, [60 N. W. 894]; *Elliott v. Heath*, 14 N. H. 131; *Boyett v. Braswell*, 72 N. C. 260; *Davis v. Yates*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 265; *Warren v. Bean*, 6 Wis. 120.)

In *Azema v. Levy*, 5 N. Y. Supp. 418, under a contract to sell and deliver five hundred bags of beans, to be delivered in two lots of two hundred and fifty bags each, it was held that a refusal of the buyer to accept the first shipment of two hundred and fifty bags released the seller of the obligation to make any further tender.

In *Providence Coal Co. v. Coxe*, 19 R. I. 380, 382, [35 Atl. 210], plaintiff sued for breach of contract to sell and deliver ten thousand tons of coal, the shipments to be distributed equally over a period of several months. It was held that the refusal of plaintiff to take the agreed portions of the coal during the earlier months precluded recovery of damages for refusal of defendant to supply coal during the latter months.

So, also, in *Canda v. Wick*, 100 N. Y. 127, [2 N. E. 381], it was held that the refusal of the buyer to receive one boat-load of bricks on a contract calling for the delivery of four hundred thousand bricks, to be delivered from time to time, absolved the seller from making any further deliveries, the grounds of the refusal to accept being found to be untrue in fact.

It has also been held that the refusal of one party to a contract to make payment as called for by the terms of a contract excuses the other party from further performance on his part. (*Johnson v. Tyng*, 1 App. Div. 610 [37 N. Y. Supp. 516]; *Schwartz v. Saunders*, 46 Ill. 15; *Hale v. Sheehan*, 52 Neb. 184, [71 N. W. 1019]; *Minaker v. California Canneries Co.*, 138 Cal. 238, [71 Pac. 110].)

In *Minaker v. California Canneries Co.*, 138 Cal. 238, [71 Pac. 110], defendant refused to make payments required by custom on a contract for sale of fruit, and on being sued for the fruit that had been delivered counterclaimed for damages because of refusal of plaintiff to deliver the balance of the fruit. The court said: "Of course, defendant was not en-

titled to recover damages as for breach of the contract on the part of plaintiffs without showing performance on its part of its own agreement. This it failed to do; but, on the contrary, it was the first party to disregard and violate the conditions of the contract. It was just as important that payment should be made as agreed upon as it was that deliveries should be made according to the contract, and when one of the parties flatly declared that it would not pay as agreed, the other party had the right to refuse to further deliver."

In the case at bar it is not necessary for us to determine that the delay in making payment for the fifth carload of apples was such a breach as excused the defendant from further performing. It is sufficient to say that the refusal to accept or to pay for the eighth carload of apples was such a breach on the part of plaintiff as precludes it from the recovery of any damages because of the refusal of defendant to make any further deliveries. It signed and was bound by the terms of the contract. It was just as much its duty to accept the apples, when delivered under the contract, if of the stipulated quality, as it was the duty of defendant to deliver the apples. Being the first to refuse to perform, it cannot complain because the defendant refused to further perform on his part. (See cases cited *supra*, and also to the same effect, *Dunn v. Daly*, 78 Cal. 644, [21 Pac. 377]; *Twomey v. People's Ice Co.*, 66 Cal. 233, [5 Pac. 158]; *Johnson v. Moss*, 45 Cal. 515.)

The point urged by appellant that defendant did not show that he had given notice of a rescission of the contract cannot avail appellant. Defendant's defense is not predicated upon a rescission of the contract on his part, but rests upon the proposition that one party to a contract who has refused to perform his part of the contract cannot recover damages for a refusal of the other party to perform after such breach. The rule that one who wrongfully refuses to perform the conditions of a contract on his part cannot recover for a breach of the contract by the other party is akin to the rule in equity that one who asks equity must do equity.

The plaintiff not being entitled to recover at all because of its own breach of the contract, any rulings that the court made concerning the admission of evidence on the question

of damages, as well as its failure to find upon any such questions, become immaterial.

We find no errors prejudicial to the plaintiff.

The judgment and order are affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 20, 1907, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 21, 1907.

[Civ. No. 207. First Appellate District.—March 25, 1907.]

VIRGINIA TIMBER AND LUMBER COMPANY, Respondent, v. GLENWOOD LUMBER COMPANY, Appellant.

ACTION FOR CONVERSION OF GOODS—PLEADING—FRAUDULENT SALE NOT ALLEGED—INADMISSIBLE EVIDENCE.—In an action for conversion, in which the complaint merely alleges the conversion by defendant of lumber belonging to the plaintiff, where it appears in proof that the property was sold by plaintiff to a third party not made defendant, and that such third party sold the same to the defendant to pay a pre-existing debt, and no facts are alleged constituting the fraud of such third person in procuring the property from plaintiff through false representations, or showing a rescission of the sale for such fraud, or that defendant purchased with knowledge of the fraud, the court erred in admitting evidence of any fraudulent purchase vitiating the title of such third party, as against the defendant's title.

ID.—TRANSFER FOR PRE-EXISTING DEBT—VALUABLE CONSIDERATION—ERRONEOUS INSTRUCTIONS.—By the law of this state, a transfer of personal property in consideration of a pre-existing debt is a transfer for a valuable consideration. Where there was no evidence that the transferee thereof for such debt had any knowledge of a prior fraudulent transfer from the plaintiff, instruction that a pre-existing debt is not a sufficient consideration to warrant the person securing the property to hold it as against the right of the person from whom the property was obtained by fraud in the purchase, and that the crediting of its value on the pre-existing debt would not make the second transferee an innocent purchaser for value, were erroneous.

APPEAL from a judgment of the Superior Court of Santa Clara County. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

Jackson Hatch, and Walter H. Linforth, for Appellant.

Corbet & Goodwin, B. A. Herrington, and Louis H. Brownstone, for Respondent.

COOPER, P. J.—Action to recover damages for the alleged wrongful conversion of personal property.

The action was tried with a jury, and a verdict rendered for plaintiff in the sum of \$1,625.59, for which judgment was entered. This is an appeal from the judgment on the judgment-roll and a bill of exceptions.

The plaintiff alleges that on or about the fifteenth day of July, 1903, it was the owner and entitled to the possession of a lot of lumber described in the complaint, and that defendant at said time wrongfully converted the same to its use, to the damage of plaintiff in the sum of \$2,000, for which amount judgment is prayed.

In support of the complaint the plaintiff, under proper objections on the part of defendant, was allowed to introduce evidence tending to show that, between the first day of May and the first day of July, 1903, it sold and delivered the lumber to one Routt on credit; and that it has not been paid for said lumber; that at the time Routt purchased the lumber he was doing business under the name of the San Jose Lumber Company and had his office with defendant, and used its yard in which to pile the lumber; that the lumber was hauled from the railroad depot with defendant's teams, and was, when placed in defendant's yard, turned over to and became, so far as Routt was concerned, the property of defendant; that in March, 1903, before any of the lumber had been sold or delivered to Routt, he had entered into a written contract with defendant to purchase its entire stock of lumber in its yards for the sum of about \$39,000, of which sum the said Routt paid \$3,000 and no more; that under the contract so made by Routt with defendant, the entire stock of lumber in defendant's yard was to remain the property of defendant

until fully paid for by Routt, but the business was to be carried on as before, a correct account of the expenses and of all sales to be kept, and Routt to be credited on the purchase price with the net proceeds of such sales; that Routt was to keep up the stock of lumber, so as to keep the business going; that Routt agreed with defendant to keep up at his own cost and charge all such lumber and supplies incident to the proper carrying on of defendant's business in connection with said lumber-yard, an account of all transactions and sales to be kept; that the lumber in controversy was sold and delivered to defendant by Routt under such arrangement; that prior to selling the lumber to Routt plaintiff had asked him for references as to his honesty and financial standing, and that plaintiff communicated with the persons to whom it was referred, and received from them replies highly favorable to Routt.

In other words, the plaintiff's theory of the case upon the trial was that the sale made by it to Routt was made through fraud, consisting of false representations made by Routt as to his financial standing and his ability to pay, and that defendant was not an innocent purchaser for value, for the reason that the consideration of the transfer to defendant was a prior indebtedness of Routt to defendant.

Routt was not made a party defendant. It is conceded that the lumber was sold and delivered to him by plaintiff. The complaint contains not a word as to any fraud, or as to any attempt by plaintiff to rescind.

The question, then, is as to whether or not the plaintiff, having sold and delivered the lumber to Routt, can, under the complaint in conversion, notwithstanding defendant's objection, prove facts to show that the sale to Routt was fraudulent, and therefore void. We are clearly of the opinion that the evidence was not admissible under the pleadings. The complaint must state the facts upon which it is sought to recover. In order to have enabled the plaintiff to introduce evidence of fraud in this case, it must have alleged the facts and circumstances with sufficient particularity, to show that the sale to Routt was fraudulent. It alleged that it was the owner and entitled to the possession of the property at the time it claims that the defendant converted it, but the evidence shows that it had prior to that time sold and delivered it to Routt. Plaintiff, in order to have been entitled to any relief, must necessarily have proven the sale to Routt and that it was

fraudulent. The cause of action depended upon the proof of fraud. If it was necessary to prove fraud in this case, it was necessary to allege it. The defendant was entitled to know the facts upon which the plaintiff relied so that it might prepare itself to meet them. Defendant was charged with having wrongfully converted the property, but it appears that it purchased the property from Routt, to whom it had been sold by plaintiff. Plaintiff, having sold the property to Routt and delivered him the possession of it, enabled Routt to sell to defendant with an apparently good title. If the plaintiff would relieve itself of its sale to Routt it must state the facts constituting the fraud with sufficient particularity to enable the defendant to meet them. The object of pleading is to arrive at the issue and give fair warning to the adversary. The issue to be tried in this case was as to whether or not the sale to Routt was procured by fraud. The reasoning of *Burris v. Adams*, 96 Cal. 664, [31 Pac. 565], seems to dispose of the case at bar. That was an action in which the plaintiff claimed to be the owner, and desired his title quieted to an undivided one-eighth of certain land. His cause of action depended upon proof of fraud at a certain probate sale, but he did not allege the facts constituting the fraud upon which he relied. The court below sustained the objection to the evidence, upon the ground that there was no averment in the complaint of the acts constituting the fraud. The court sustained the ruling, and in the opinion said: "The complaint contains only the averments usually employed in an ordinary action to quiet title. Where the cause of action depends upon the proof of fraud, the facts constituting the fraud must be averred. . . . He knew from the start that the respondent had a perfect legal title, which he could overthrow by proving her guilty of a certain fraud, and he did not aver fraud even in general terms." In the case at bar the plaintiff knew that it, at least, had parted with the legal title to the lumber by a sale thereof, and that it could not recover without overthrowing that sale. It did not aver the fraud, or even mention the sale. It knew it had sold the lumber, but alleged that it was the owner thereof.

In *Wetherly v. Strauss*, 93 Cal. 283, [28 Pac. 1045], the defendant claimed that the money deposited was the property of the husband of plaintiff, and that the intent of the deposit in the wife's name was to defraud creditors. The court said:

"If the appellant had intended to avoid such gift he should have made proper averments therefor in his answer, in order that the plaintiff might meet them at the trial. Fraud is never to be presumed, and whenever it constitutes an element of a cause of action, or of a defense which is of an affirmative nature, and invoked as conferring a right against the plaintiff, it must be alleged."

In *Capuro v. Builders' Ins. Co.*, 39 Cal. 124, the court said: "The rule is, undoubtedly, as stated by appellant, that when a party relies upon fraud, either to support his cause of action or in defense, he must set up the facts which constitute the fraud. It follows, as a necessary consequence of that proposition, that he can prove only those facts which he has set up."

To the same effect see *Kent v. Snyder*, 30 Cal. 666; *Sterling v. Smith*, 97 Cal. 343, [32 Pac. 320]; *Moore v. Copp*, 119 Cal. 429, [51 Pac. 630]; *Burris v. Kennedy*, 108 Cal. 331, [41 Pac. 458]; *Albertoli v. Branham*, 80 Cal. 631, [13 Am. St. Rep. 200, 22 Pac. 404]; *Glazer v. Clift*, 10 Cal. 303; *Leszinsky v. White*, 45 Cal. 278.

Plaintiff does not cite any California case in support of its contention, but it cites four cases from other states, in which it is claimed the rule is different. Two of them are from Nebraska—*Phoenix Iron Works v. McEvoy*, 47 Neb. 228, [53 Am. St. Rep. 527, 66 N. W. 290], and *Pekin Plow Co. v. Wilson*, 66 Neb. 115, [92 N. W. 176]. They were actions in replevin, and the court held that "The Code takes actions of replevin out of the general rule in regard to pleadings."

Even if this were an action in replevin, we have no such code provision.

Benisch v. Waggoner, 12 Colo. 534, [13 Am. St. Rep. 254, 21 Pac. 706], was an action in replevin, and proceeds upon the theory that in such action, where a delivery of the property is claimed, an affidavit must be made by the plaintiff showing "the alleged cause of detention thereof according to his best knowledge and belief," which it would seem would inform the defendant sufficiently as to the acts claimed to be fraudulent.

Salisbury v. Barton, 63 Kan. 552, [66 Pac. 618], was an action in replevin. The facts are not fully stated in the opinion. The court said that the plaintiff pleaded three elements which, if proved, would entitle him to recover—"ownership, right of possession, and wrongful detention

by the defendants." In the case at bar the plaintiff claimed that it had parted with the ownership by reason of a sale; that such sale was the result of fraud, and that it rescinded the sale. Having parted with the ownership, its right of action depended upon proving facts showing that by reason of fraud it was induced to part with such ownership, so as to entitle it to be relieved of the effect of the transfer of such ownership. It was not entitled to prove such facts without alleging them.

The court, at the request of plaintiff, gave instructions numbered 5, 6, 7, and 8, in regard to the question of an innocent purchaser for value. The sixth instruction is as follows: "I instruct you, that a pre-existing debt is not a sufficient consideration for the transfer of property, to warrant the person securing such property to hold it as against the right of the one from whom the buyer has obtained such goods by fraud in the purchase." Instructions 5, 7, and 8, contain the same proposition expressed and repeated in different words. The eighth instruction expressly states that the "crediting of the value of said lumber to the account of said Routt by the Glenwood Lumber Company, pursuant to the contract made between the Glenwood Lumber Company and said Routt March 31, 1903, would not make said Glenwood Lumber Company an innocent purchaser for the value of said lumber." No evidence was offered in any way to connect the defendant with any fraud, or the knowledge of any fraud, on the part of Routt. and hence it is evident that the proposition as stated to the jury by the instruction was that the payment of a prior indebtedness was not a valuable consideration for the sale of the lumber to defendant. Such is not the law in this state, and the giving of the instructions was error.

A conveyance or transfer of property in consideration of a pre-existing indebtedness is a conveyance for a valuable consideration. (*Frey v. Clifford*, 44 Cal. 342; *Davis v. Russell*, 52 Cal. 611, [28 Am. Rep. 647]; *Sackett v. Johnson*, 54 Cal. 107; *Foorman v. Wallace*, 75 Cal. 552, [17 Pac. 680]; *Duff v. Randall*, 116 Cal. 226, [58 Am. St. Rep. 158, 48 Pac. 66].)

The judgment is reversed.

Kerrigan, J., and Hall, J., concurred.

[Civ. No. 369. Second Appellate District.—March 28, 1907.]

LYDIA M. JOHN, Petitioner, v. SUPERIOR COURT OF
LOS ANGELES COUNTY, etc., Respondent.

DIVORCE—INTERLOCUTORY JUDGMENT—DISPOSITION OF HOMESTEAD ON SEPARATE PROPERTY—JURISDICTION.—Where the complaint by the husband for divorce alleged the selection of a homestead on the separate property of the husband therein described, the court had jurisdiction, and it was its duty, under section 131 of Civil Code, at the time of the hearing and granting of the interlocutory judgment that plaintiff is entitled to a divorce, to hear and determine the issue tendered as to the title to the homestead property, and to include in the interlocutory judgment an assignment of the homestead to the husband, as its former owner, in pursuance of sections 146 and 147 of the Civil Code.

ID.—RIGHT TO FINAL JUDGMENT—DEATH OF PLAINTIFF PENDING MOTIONS.—Where, after the lapse of the year without appeal, the plaintiff properly moved for a final judgment, the death of the plaintiff pending the disposition of the motion and of counter-motions of the defendant relating to the question of property rights did not impair the power of the court to render final judgment for the plaintiff, under the express provisions of section 132 of the Civil Code and of section 669 of the Code of Civil Procedure.

APPLICATION for a writ of review to annul a judgment of the Superior Court of Los Angeles County. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

T. M. Stewart, for Petitioner.

H. C. Lawson, for Respondent.

SHAW, J.—This is an application for writ of *certiorari*.

In an action for divorce brought by Joseph S. John, against the petitioner, Lydia M. John, it was alleged that certain real property therein described was the separate property of the plaintiff in said action and that plaintiff had declared a homestead thereon. The default of the defendant was duly entered, followed on January 31, 1905, by an interlocutory judgment, whereby it was adjudged that plaintiff was entitled to

a divorce, and that the homestead set out in the complaint was the separate property of the plaintiff and should be set aside and awarded to him. Nearly one year after the entry of this judgment the defendant, who is petitioner here, interposed certain motions having for their object the reopening of the case so far as it disposed of the real estate, all of which motions were denied, and on May 26, 1906, and after the death of the plaintiff, Joseph S. John, which occurred March 8, 1906, the court rendered its final decree in accordance with the interlocutory judgment and decision had upon the trial of the case.

Petitioner contends: 1. That that part of the interlocutory judgment adjudging the real property to be the separate estate of the plaintiff was and is in excess of the jurisdiction of the court; 2. That the final decree, by reason of the fact that it was rendered after the death of Joseph S. John, the plaintiff in said action, was and is void. Neither position is tenable. It appears from the complaint that certain real estate therein described constituted the homestead of the parties, and it was alleged that the said real estate so homesteaded was the separate property of the plaintiff. Section 147, Civil Code, requires that "the court, rendering a decree of divorce, must make such order for the disposition of the . . . homestead, as in this chapter provided." And section 146, Civil Code, provides: "In case of the dissolution of the marriage, . . . the homestead shall be assigned as follows: . . . 4. If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property. . . ."

It clearly appears from the above-quoted provisions of the code that it was the duty of the court to determine whether or not the real estate described in the complaint was the separate property of the plaintiff as therein alleged. It was an issue in the case, and section 131, Civil Code, contemplates that all issues embraced in the pleadings shall be tried and determined at the time when, and upon the trial wherein, the court determines whether or not "the divorce ought to be granted." It is at this time that the court is required to "file its decision and conclusions of law as in other cases," and this decision must respond to all the issues involved in the action. (*Glass v. Glass*, 4 Cal. App. 604, [88 Pac. 734].) In this case, one of the issues was whether or not the real property upon which

the homestead was impressed was the separate property of the plaintiff. Section 132 gives the court the power of its own motion to enter final judgment at the expiration of one year from the entry of the interlocutory judgment; and the fact that this authority is given the court would seem to exclude the idea that a trial was contemplated at the time of entering this last judgment. It has been said that there are three parties to an action for the dissolution of the bonds of matrimony; that the state, by reason of its interest in maintaining the marriage relation, is an interested third party. (*De Yoe v. Superior Court*, 140 Cal. 482, [98 Am. St. Rep. 73, 74 Pac. 28].) The real parties are not allowed to control the subject of the action as they may dispose of property rights. "The legislature has complete control of the subject, and may impose whatever restrictions or delays it pleases, either in regard to the time for beginning the action, or the method and order of procedure after the action is begun." (*Grannis v. Superior Court*, 146 Cal. 256, [106 Am. St. Rep. 23, 79 Pac. 891].) And it may likewise, upon a dissolution of the marriage, when the property rights of the parties to a divorce suit are involved, require that such rights and property interests shall be determined by the court at the time when the court determines whether "the divorce ought to be granted." The decision of the court, both as to the granting of the divorce and the disposition of the property, is subject to review on appeal; and certainly it was never intended that there should be a delay of a year, or possibly a longer period in case of an appeal from an interlocutory judgment, and then another trial as to issues involving the property rights of the parties, followed by the delay of another appeal from a decision of the court thereon and judgment disposing of the same.

It appears that at the expiration of the year the plaintiff made a motion for final judgment. This was opposed by the defendant, and pending the disposition of defendant's motions, the plaintiff died, and final judgment was not entered until May 26th. His death, according to the express provisions of section 132, Civil Code, did not impair the power of the court to enter final judgment. Section 669, Code of Civil Procedure, provides that if a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. There had

been a decision of all the issues of fact at the time of entering the interlocutory judgment, and both section 132, Civil Code, and section 669, Code of Civil Procedure, constitute authority for the action taken by the court in this case.

The application is denied.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 306. Second Appellate District.—March 26, 1907.]

CHARLES L. GOOD, Respondent, v. COMMON COUNCIL OF THE CITY OF SAN DIEGO et al., Appellants.

MUNICIPAL CHARTER—RECALL OF ELECTED OFFICER—CONDITIONAL TENURE OF OFFICE.—Where a municipal charter provides that the holder of any elective office may be removed at any time by the electors qualified to vote for a successor, subject to the condition that twenty-five per cent of the electors of the district express their disapproval of his action upon some measure or as to some policy, and demand that he be sustained by a vote of confidence or retire, the charter does not contemplate an ordinary "removal for cause," but by virtue of the charter provision, every elective officer elected after the provision was adopted holds his office subject to the condition subsequently expressed therein.

ID.—SUFFICIENCY OF REASON EXPRESSED FOR RECALL.—The recall petition of the twenty-five per cent of electors is only required to contain a general statement of the grounds of dissatisfaction on which the removal is sought, and it is sufficient that it appears in general terms that the official conduct of the officer whose recall is sought has been in opposition to the will and preferences of his constituents and obstructive to the best interests of the city.

ID.—CERTIFICATE OF CITY CLERK—NUMBER OF QUALIFIED SIGNERS.—The certificate of the city clerk required by the charter that he has compared the names on the petition of electors of the district for recall of the officer named with the great register of the county, and has found the petition to be sufficient, shows a proper exercise of the authority devolved on the city clerk to hear and determine the sufficiency of the petition, from whose determination no appeal is provided.

ID.—MANDAMUS TO CITY COUNCIL—RIGHT OF ELECTOR.—The city council have no discretion or right to refuse to act upon the petition in reference to the calling of an election, and *mandamus* will lie on the face of a sufficient petition, upon which the council have

refused to act, at suit of any one or more of the electors whose names appear therein, to compel it to act.

APPEAL from a judgment of the Superior Court of San Diego County. D. K. Trask, Judge presiding.

The facts are stated in the opinion of the court.

Eugene Daney, and E. Swift Torrance, for Appellants.

Luce, Sloan & Luce, for Respondent.

Anderson & Anderson, *Amici Curias*, also for Respondent.

TAGGART, J.—This is an appeal from an order and judgment of the superior court directing a writ of mandate to issue commanding the defendants to order an election for the recall and removal of Jay N. Reynolds, one of the defendants, from the office of councilman of the city of San Diego, to fix a date for such election and to make, or cause to be made, all necessary arrangements for the holding of such election.

Plaintiff was one of one hundred and five signers of a petition presented to the common council of the city of San Diego demanding that an election be called for the removal of said defendant Jay N. Reynolds from the office of member of the common council of the city of San Diego, for the seventh ward, and the election of his successor, under and by virtue of the provisions of section 4 of chapter IV, adopted as an amendment to article I of the charter of that city by vote of the electors thereof on January 7, 1905, which amendment was approved by resolution of the legislature of the state on February 3, 1905. (Statutes and Amendments to the Codes, California, pp. 901-922.)

The petition was signed and verified by one of the signers, as required by the charter, regularly filed with the city clerk, who within ten days thereafter submitted to the common council at its regular meeting said petition, accompanied by the certificate of said clerk in the words and figures following, to wit:

“San Diego, Cal., March 30, 1906.

“To the Honorable Common Council of the City of San Diego, California:

“This is to certify that the foregoing petition of the electors of the Seventh Ward of the City of San Diego, California,

for the recall of Councilman Jay N. Reynolds, has been examined by me, and the names on the said petition compared with the Great Register of the County of San Diego, State of California, for the year 1905, and I find said petition to be sufficient.

“(Seal)

J. F. BUTLER,
“City Clerk.”

The common council refused to act upon the petition, but “voted to disregard said petition and to table and file the same without action.”

Plaintiff brings this action as a resident and elector of the seventh ward, a qualified signer of said petition, and a property owner and taxpayer in said city, and sets forth the petition for recall in full in his “Affidavit and Petition” in the proceeding before the superior court.

Defendant moved to quash the alternative writ issued *ex parte*, and demurred to plaintiff’s affidavit and petition upon which the writ issued. The motion was denied and the demurrer overruled, and defendants, declining to answer, judgment was entered in favor of plaintiff, making the alternative writ peremptory.

These rulings of the court were excepted to and are assigned as error because: 1. The affidavit and petition does not show the petitioner to be a party beneficially interested in the issuance of the writ; 2. The petition for recall does not state grounds sufficient in law; 3. The clerk’s certificate attached to the recall petition does not comply with the charter provision by “showing the result of said examination” of the great register; 4. The determination of the sufficiency of the recall petition rests in the discretion of the common council and cannot be controlled by the mandate of the courts; and 5. The time within which the election should have been held under the provisions of the charter having already expired, no election can be called by the said common council, and the court had no jurisdiction to order an election at a later date.

The fixing of the tenure of office of the officers of a municipality subject to removal by the body that elected them is comparatively new in our system of government, and the interpretative branch of the law is in rather an undeveloped state on the subject. A responsible government, however, is the very foundation of the republican system, and there appears no reason why a representative should not be made to retire

at any time at the request of the people, as well as at the end of a fixed period. This is not deemed incompatible with a republican form of government in France, and several of the South American states. It is similar in principle and application to the custom or rule which makes the ministry or real government of Great Britain answerable at all times for its failure to meet the approval of the electorate of that country on some measure or question of policy.

It was evidently the purpose of the framers of the section of the San Diego charter under which the petition in this case was filed to ingraft this principle upon the charter of that city. In the operation of this charter the question is not whether there was cause for the removal of the councilman from office as the word "cause" has heretofore been used in this connection. The fitness of the incumbent, or the propriety or impropriety of his conduct is not alone involved. Malfeasance, misfeasance, or nonfeasance in office may call for the exercise of the right conferred by this section, but it includes more than these. The charter provides for an answerable or responsible tenure in all elective offices, and "the holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent." By virtue of this provision every elective officer elected after the adoption of the amendment holds office subject to the condition subsequent that twenty-five per cent of the electorate of the district from which he was elected may by petition express their disapproval of his action upon some measure or as to some policy, and demand that he be sustained by a vote of confidence or retire.

A clear conception of the purpose of this proceeding as distinguished from an ordinary "removal for cause" is necessary in the consideration of the questions here presented. The power to remove a corporate officer from office, for reasonable and just cause, is one of the common-law incidents of all corporations, and this extends to elective, as well as appointive, officers (*Richards v. Clarkburg*, 30 W. Va. 491, [4 S. E. 774]; *Dillon on Municipal Corporations*, secs. 242, 243); and it is competent for the charter of a city to so provide. (*Croly v. Sacramento*, 119 Cal. 234, [51 Pac. 323].) In such cases the "just cause" is to be construed as something more than the mere wish of that part of the sovereign people which elected the officer whom it is attempting to remove.

A case of "removal for just cause" in this sense implies some misconduct upon the part of the officer, or imputes to him some violation of the law. Under such circumstances it is necessary that the charges against him shall be based upon some refusal to obey or intention to violate the law prescribing his duties. There are often such penalties attached to proceedings for the removal of officers "for cause shown" that they are and should be carefully guarded from abuse (*Croly v. Sacramento*, 119 Cal. 234, [51 Pac. 323]); but as to the right to the office as against the people, it is a well-recognized rule that the agency may be terminated at any time by the sovereign power without reason given. (*Matter of Carter*, 141 Cal. 319, [74 Pac. 997].) Offices are created by the people for administration of public affairs and not for the benefit of the office-holder, and revocable at the pleasure of the authority creating them, unless such authority is limited by the power which conferred it. (*Attorney General v. Jochim*, 99 Mich. 358, [41 Am. St. Rep. 606, 58 N. W. 614].) There is no doubt that the provision here under consideration, and similar ones in other city charters, are intended to check a growing forgetfulness on the part of office-holders of the principle that the duties of their offices are to be discharged in the interest of the public and not their own. In the consideration of a freeholders' charter the intention of the people in its adoption is to be considered as a rule of construction. Provisions for the summary removal of appointive officers for cause shown are made by the charter. The general law and the common-law power of amotion, as well as the provisions of the charter, provide for removals of this kind. The purpose of section 4, however, is the reservation, by the people, of the right to remove any elective officer of the city whenever a majority of the electors shall so determine.

The reason why the removal is asked in this case, and the grounds upon which the petition for recall rests, are, that the councilman whom it is sought to remove voted for and supported a certain ordinance regulating the licensing and sale of liquors in the city of San Diego; that he voted to disregard a former petition for his recall; that he repeatedly voted to disregard petitions to refer to the vote of the people ordinances passed by the council of said city filed in conformity to the provisions of the charter; and that he voted for a false certification of an ordinance to prevent a referendum.

The only reference in the recall petition to the wishes or desires of the councilman's constituents in regard to the matters mentioned, and the only allegation in relation thereto in the "Affidavit and Petition" for the writ of mandate, is found in the following language in the recall petition: "That the official conduct and action of said Jay N. Reynolds ever since he entered upon the duties of said office has been in opposition to the will and preferences of his constituents, and obstructive to the best interests of the City of San Diego."

If there be enough of substance in the grounds as stated the proceeding should not be held to have failed because of lack of detailed and specific statement. The charter provides for a general statement only of the grounds on which the removal is sought, and we think the petition sufficient to cover this provision and to indicate to the officer whose removal is sought why his successor is asked to be elected.

The certificate of the city clerk is that he had compared the names on the petition with the great register and found the petition to be sufficient. This was the "result of his examination." Findings that there were three hundred and ninety-three votes cast at the last election, and that the one hundred and five names on the petition were on the great register could have added nothing to this. That it was sufficient implied "that it fulfilled the requirements of the law." There was nothing to be done by the common council in this connection if the petition had not been sufficient, as the law provided that, if the petition be found insufficient *by the clerk*, he should return it to the petitioners.

In *Davenport v. Los Angeles*, 146 Cal. 508, [80 Pac. 684], in a similar proceeding, the certificate of the clerk was held to be insufficient because it was ambiguous, and on its face showed that the city clerk had not complied with the charter provision contained in the charter of the city of Los Angeles. This provision is the same as that in the San Diego charter. (Amendments, Los Angeles Charter, sec. 198-c; Statutes and Amendments to Codes, California, 1903, p. 574.)

By these charter provisions the right to petition for the removal of a public officer is vested in "the electors entitled to vote for a successor to the incumbent sought to be removed." This being the foundation of the right, those who are entitled to demand that the common council call the election can certainly maintain the action to protect the right granted. There

is but one question, then, as to how the action must be brought. Must all the petitioners join, must one sue on behalf of himself and others, or may one sue alone? We think the authorities sustain the right of one or more of the petitioners to maintain the proceeding for a writ of mandate. (*Windsor v. Polk Co.*, 115 Iowa, 738, [87 N. W. 705]; *Kimberly v. Morris*, 87 Tex. 637, [31 S. W. 808]; *Frederick v. San Luis Obispo*, 118 Cal. 391, [60 Pac. 661].)

There is no discretion vested in the common council in connection with the calling of this election. That body's functions are purely ministerial, but if it be conceded that it was vested with some discretion, it does not follow that it can refuse to act. The duty of determining whether or not the petition contains the proper number of signatures and the comparing of them with the great register devolved upon the city clerk. He is the person given authority to hear and determine the question of sufficiency of the petition, and no appeal therefrom is provided and none apparently intended to be given. This is evident from the provision of the act requiring the return of the petition by the city clerk to the petitioners if found insufficient, and which, in effect, negatives petitioner's right of appeal. "Whenever any board, tribunal, or person is by law vested with authority to decide a question, such decision, when made, is *res judicata*, and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction." (Freeman on Judgments, sec. 531; cited and affirmed in *People v. Los Angeles*, 133 Cal. 342, [65 Pac. 749], and *People v. Ontario*, 148 Cal. 637, [84 Pac. 205].) But conceding that the council had supervisory power and refused to order an election in the face of a sufficient petition, *mandamus* will lie to compel it to act. (*Sansom v. Mercer*, 68 Tex. 488, [2 Am. St. Rep. 505, 5 S. W. 62]; *Keller v. Hewitt*, 109 Cal. 146, [41 Pac. 871]; *Wood v. Strother*, 76 Cal. 545, [9 Am. St. Rep. 249, 18 Pac. 766].)

It would be a strange perversion of the law if the common council, in order to defeat one of the provisions of the charter could merely, by dilatory action, not only refuse to comply with the directions of the charter, but prevent the courts from furnishing a remedy for the wrong done by its act. This would furnish the exception to section 3523 of the Civil Code that, "For every wrong there is a remedy." Such a result

is to be avoided, if possible. Conceding that provisions of the election law are mandatory, they are yet to be liberally construed to accomplish the purpose intended by the law. (*Jennings v. Brown*, 114 Cal. 307, [46 Pac. 77]; *Packwood v. Brownell*, 121 Cal. 480, [53 Pac. 1079].) We find nothing in any of the cases cited that calls for a construction of the law that would defeat its purpose entirely, when there is one which would enable it to be enforced or carried out in the manner provided by its terms.

The policy of the law and its effect are both much discussed in the briefs of counsel for both parties, as well as those of the *amici curiae*, and the latter and the respondent have strenuously defended the constitutionality of the charter provision, although appellant disclaims any intention of raising this question. The policy of the law has been considered by us only in so far as it was necessary to determine the purpose and intention of the people of the city of San Diego in adopting the section involved. Whether, as applied, "their new scheme of reform will result in disastrous consequences," or not, is a matter that should have been considered by the people in adopting the amendment to the charter, but it cannot affect the action of this court on the question before it.

The constitutionality of the charter provision, not being presented by the appellant, has not been considered. The recent decision of the supreme court in *Re Pfahler*, 150 Cal. 71, [88 Pac. 270], discusses many of the propositions of law presented by respondent in his brief in relation to the constitutionality of the section of the charter here being considered, as applied to other provisions of the charter of Los Angeles city, and is conclusive as to some of them; but this matter is not before us.

Judgment of the superior court affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 333. Second Appellate District.—March 26, 1907.]

AMESTOY ESTATE COMPANY et al., Appellants, v. CITY OF LOS ANGELES, Respondent.

JUDGMENTS—VACATION—MISTAKE OF LAW BY ATTORNEY—RELIEF IN EQUITY—INSUFFICIENT COMPLAINT.—Though a complaint in equity to vacate a judgment may disclose a sufficient ground for relief by motion under section 473 of the Code of Civil Procedure, addressed to the discretion of the court, for a mistake of law on the part of the defendant's attorney, had such motion been made in time, yet, the time having elapsed for such motion, the mere averment of such mistake of law in the complaint, not occasioned by any act of the defendant causing the plaintiff to default in an action brought by the defendant to quiet title to a water right against the plaintiff, states no cause of action for relief in equity against the judgment in such action.

Id.—MISTAKE IN ACCEPTING OPINION OF ATTORNEY—RIPARIAN RIGHTS—CLAIM OF WATER RIGHT BY CITY.—Where the complaint shows no mistake of fact on plaintiff's part, and the only mistake, if any, was in accepting the opinion of plaintiff's own attorney, as matter of law, that the claim of a water right on the part of the city was superior to that of the plaintiff as a riparian owner on the stream, which alone led it to make default in an action to quiet the city's title to the water against the adverse claim of the plaintiff, the rule is applicable that "neither the ignorance, the blunders, nor the misapprehension of counsel, not occasioned by the adverse party, is any ground for vacating the judgment or decree."

Id.—FALSE CLAIM OF CITY—ISSUE TENDERED BY COMPLAINT—CONCLUSIVENESS OF JUDGMENT.—Conceding that the city's claim to the entire water of the stream was false and fraudulent as against the plaintiff, as a riparian owner, and might have been successfully defended, yet as an issue was tendered upon the claim, and the plaintiff, as defendant, was called upon to set forth any adverse claim on its part, the claim of the city was in no sense collateral to the merits of the action; and the judgment declaring the adverse claim is conclusive, where there was no concealment or imposition upon the court, and no extrinsic or collateral fraud is shown on the part of the city to prevent a fair submission of the controversy.

Id.—JUDGMENT UPON EVIDENCE—PRESUMPTION—INCONSISTENT AVERMENT OF VOID JUDGMENT.—Where the judgment set forth in the complaint shows that it was not merely rendered by default, but that it was ordered in accordance with the prayer of the complaint, the presumption is that it was rendered upon competent

evidence, and the plaintiff cannot be heard in this proceeding in equity to question the sufficiency of the evidence presumably before the court, which was by it determined to warrant the judgment, and an inconsistent averment that it was an unauthorized and void judgment by default is controlled by the judgment set forth.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

R. M. Widney, for Appellants.

W. B. Mathews, H. T. Lee, and J. R. Scott, for Respondent.

ALLEN, P. J.—Action to vacate a judgment of the superior court, and to enjoin defendant from asserting rights thereunder.

The complaint alleges ownership by plaintiff of a large ranch in Los Angeles county, traversed by the Los Angeles river, a non-navigable stream. That said lands are riparian to said stream and the waters thereof are necessary for the irrigation of said lands, and have been so used for more than fifty years. That heretofore, in April, 1903, while plaintiff was so seised, the defendant commenced an action against plaintiff in the superior court of Los Angeles county to determine conflicting interests as to such water, and its use; that service of summons was duly made upon plaintiff in June following. That after said service plaintiff correctly and fully stated all the facts involved in said litigation to its attorney, who advised it that it could not successfully defend against said action, and against further expense or litigation in reference thereto. That plaintiff, acting upon such advice, permitted its default to be entered and, on September 11, 1903, judgment was ordered by the court in accordance with the prayer of the complaint and duly entered, by which it was adjudged that the city was the owner in fee of the paramount right to the use of all of the water of said river so far as may be reasonably necessary from time to time to give an ample supply of water for the use of its inhabitants, and for all municipal and public uses, and that the rights of the plaintiff herein were subordinate to the rights of said city. It is al-

leged that this judgment was ordered upon an unverified complaint and no evidence was offered additional in its support.

Plaintiff, in the complaint under consideration, alleges, further, that the claim of right asserted by said city in its complaint was unfounded; that the said city possessed no rights to said water, and that it well knew such fact and falsely stated that it had title thereto, well knowing that plaintiff herein was the owner of said lands, and the riparian rights incident thereto. That plaintiff herein did not discover the mistake and error of its attorney for more than a year after the entry of the judgment aforesaid, nor until January, 1905. That had plaintiff known of the error and mistake of its counsel it would have appeared and defended said action, and by its answer presented a good and complete defense upon the merits. The complaint further alleges that the riparian rights of the plaintiff are of large value, and without which the value of its lands is destroyed.

A general demurrer of the city to the complaint was sustained by the court, and the plaintiff, not desiring to further amend, judgment was entered dismissing the plaintiff's action. From this judgment plaintiff appeals.

The judgment of dismissal, not being for one of the causes provided in section 581, Code of Civil Procedure, must be held a judgment upon the merits under section 582; and this appeal, therefore, involves the action of the court in sustaining the demurrer of the defendant to the complaint. The facts admitted by the demurrer would entitle plaintiff to relief under section 473, Code of Civil Procedure, had application been made to the court within a reasonable time, not exceeding six months. (*Parsons v. Weis*, 144 Cal. 410, [77 Pac. 1007]; *Douglass v. Todd*, 96 Cal. 657, [31 Am. St. Rep. 247, 31 Pac. 623].) "When the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or propriety preventing the interference of equity." (*Brackett v. Banegas*, 116 Cal. 285, [58 Am. St. Rep. 164, 48 Pac. 90].) But there is a marked distinction between the powers of the court in the first instance, wherein discretion is given to the court to relieve a party from a mistake, fraud, or from excusable neglect, under section 473, Code of Civil Procedure, and those powers exercised by a court of equity after the lapse of such time when proceedings are instituted by an

original bill to vacate the judgment of another court. That a former judgment may be set aside by a court of equity on the ground of fraud, it must be fraud extrinsic or collateral to the questions examined and determined in the action. (*United States v. Throckmorton*, 98 U. S. 61; *Pico v. Cohn*, 91 Cal. 129, [25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537]; *Langdon v. Blackburn*, 109 Cal. 26, [41 Pac. 814]; *Hanley v. Hanley*, 114 Cal. 692, [46 Pac. 736].)

When the city instituted its original action against plaintiff and served upon it a copy of the complaint, plaintiff had notice of the pendency of the action, was by the service required to appear and answer, and by the code required to set up any claim of right which it possessed to the property described in the complaint. There is no suggestion in the complaint that plaintiff was prevented by any act of the defendant from appearing and making a proper defense. Conceding the false and fraudulent character of the city's claim, an issue in relation thereto was tendered by the complaint, and such claim was one of the questions examined and determined in the action. Such claim was in no sense collateral. The judgment is conclusive, unless it is shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. (*Fealey v. Fealey*, 104 Cal. 360, [43 Am. St. Rep. 111, 38 Pac. 49].) There was no concealment or imposition upon the court. The claim asserted by the city may have been one which the plaintiff herein could have successfully resisted; but it was nevertheless a claim, and under section 738, Code of Civil Procedure, an action may be brought by any person against another who claims an interest in real property adverse to him. The claim of the city was to the flow in a watercourse. This comprehends the right to have such flow continue in such watercourse over the lands affected, and such right claimed was a servitude upon the land of the plaintiff herein, and, to the extent of the easement, an interest claimed by the city affecting real property described in the complaint. (*Standart v. Round Valley Water Co.*, 77 Cal. 399, [19 Pac. 689].)

The selection of the attorney upon whose advice plaintiff acted was not induced by any act of the city. It is apparent from plaintiff's complaint that there was no mistake of fact upon its part. It knew of the claim of the city to the water

in the river, knew it was a non-navigable stream, and knew that it owned the land over which the watercourse extended and the incidental riparian rights appurtenant to such land. Its only mistake, if any, was in accepting the opinion of its attorney that, as a matter of law, the claim of right upon the part of the city was superior to that of the plaintiff as a riparian owner. "It is undoubtedly the true rule that neither the ignorance, the blunders nor the misapprehension of counsel, not occasioned by the adverse party, is any ground for vacating a judgment or decree." (Freeman on Judgments, sec. 508; Black on Judgments, sec. 375.) The facts involved in *Bacon v. Bacon*, 150 Cal. 477, [89 Pac. 317], were such as justified the conclusion that the plaintiff did not know of her own rights, which clearly distinguishes that case from the one under consideration.

A different rule obtains when the proceedings are under section 473, Code of Civil Procedure. That section is broad enough to justify the action of the court in relieving a party from a mistake of law upon the part of his attorney when from reliance thereon he was prevented from making a defense. (*Douglass v. Todd*, 96 Cal. 657, [31 Am. St. Rep. 247, 31 Pac. 623].) The broad provisions of that section are available, however, only to those seeking relief thereunder. It cannot be construed as an attempt to broaden the powers of a court of equity in determining its jurisdiction in an independent proceeding. The reason for applying different rules is obvious. In the one case, the motion is directed to the discretion of a trial court, within a limited time and before the judgment has become final; in the other, it is the exercise of equitable powers by an independent court based upon established rules. The restricted power of equity is founded upon the proposition that the verity of a judgment should under all circumstances be maintained when the attack is only upon those matters considered by the court upon the original hearing; without which rule there would be no end to litigation and no permanent rights could be established by judgments and decrees.

It is alleged in the complaint, although not urged in the briefs, that the judgment was by default and on its face void as unauthorized by section 751 of the Code of Civil Procedure. Were it conceded that section 751 applies to cases other than those where unknown owners are defendants, an inspection of

the judgment incorporated in the complaint develops that it was not by default, but was a judgment ordered in accordance with the prayer of the complaint, presumably upon competent evidence. In this proceeding, the plaintiff cannot be heard to question the sufficiency of the evidence, presumably before the court, which was by it determined to warrant the judgment.

We find no error in the record, and the judgment is affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 251. Third Appellate District.—March 27, 1907.]

WILLIAM H. HEALEY, and ROBERT TIBBITTS, Co-partners, etc., Respondents, v. ANGLO-CALIFORNIAN BANK, LIMITED, and the Managers Thereof, and MODESTO IRRIGATION DISTRICT, and the Board of Directors and President Thereof, Appellants.

IRRIGATION DISTRICT—PROPOSED BID FOR WORK—CERTIFIED CHECK—FORFEITURE—INJUNCTION—FINDINGS AGAINST EVIDENCE—INVALID PROCEEDING—SUPPORT OF JUDGMENT.—In an action to restrain the managers of defendant bank from paying a certified check, indorsed "not to be paid unless forfeited," which was delivered to the irrigation district defendant, with a sealed bid for proposed work on its canal system, the check to be returned if the bid was not accepted, and forfeited if the bid was accepted, and not complied with by plaintiff, where issue was joined as to the acceptance of the bid and noncompliance therewith by the plaintiff, and the court found against evidence as matter of fact that the averments of the complaint were true, and the denials and averments of the answer were untrue, a judgment for the plaintiffs can only be supported upon the theory that the court found, as matter of law, that the whole proceeding was invalid, and that the attempted acceptance and award were nugatory.

Id.—FAILURE OF OFFICERS OF DISTRICT TO COMPLY WITH ESSENTIAL PROCEEDINGS—VOID CONTRACT—BIDDER NOT ESTOPPED.—Where the officers of the irrigation district, which is a public municipal corporation, have dispensed or failed to comply with any of the essential proceedings prescribed by statute for investing them with power to contract, no liability is imposed upon the corporation by the

contract, and the bidder, whose offer is a mere naked one, without consideration, is not estopped, by reason of his failure to comply therewith, from claiming the return of the check deposited with his bid, or from enjoining the payment thereof.

ID.—ADVERTISEMENT OF LESS THAN WHOLE WORK—OMISSIONS IN DESCRIPTION—INSUFFICIENT NOTICE.—Where the advertisement under section 53 of the Wright Act was for less than the whole work, it is essential that the notice must describe the particular work to be done, as required in that section, so as to correspond with the plans and specifications thereof, which must relate to the same work, so as not to mislead bidders to their disadvantage, and the failure properly to describe the work rendered the notice insufficient.

ID.—UNCERTAINTIES AFFECTING COMPETITION IN BIDDING.—Any uncertainties affecting competition in bidding, either as to the substantial terms of the proposed contract, or a substantial variance as to such terms between the notice to bidders and the plans and specifications, or in the plans and specifications, or as to the reserved power of the engineer to change the plans and require extra work without providing for compensation, rendered the whole proceedings invalid.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

W. H. Hatton, and L. L. Dennett, for Appellants.

Alex. G. Eells, for Respondents.

CHIPMAN, P. J.—Plaintiffs allege in their complaint that on November 29, 1902, they caused to be delivered to defendant irrigation district a sealed proposal in writing to do certain work for it upon its canal system, and accompanying said proposal, placed in the possession of said defendant irrigation district their check for \$6,000, upon the face of which check was written "Not to be cashed unless forfeited"; that said check was certified by said defendant bank and was so delivered under an express agreement between said defendant irrigation district and plaintiff, that "if said proposal were not by said Modesto Irrigation District accepted, said check should be returned to plaintiffs"; that said proposal was

never accepted by defendant district nor was it ever in fact forfeited to said district; that "notwithstanding the premises, the defendants Modesto Irrigation District and F. C. Davis, as its President as aforesaid, threatens to collect the amount of said check . . . and will do so unless prevented by the injunction of this Court, to the great and irreparable injury of these plaintiffs. And the said defendant Anglo-Californian Bank . . . and the managers as aforesaid threaten to cash and pay the amount of said check . . . to said defendant Modesto Irrigation District . . . and will do so unless prevented," etc. An injunction is prayed for and also that defendant district be directed to surrender said check to plaintiffs.

The defendant bank made default. Defendant district, answering the complaint, alleged that on November 5, 1902, defendant gave notice by publication, as required by law, calling for bids for constructing a certain portion of the irrigation work of said district, a copy of which said notice is made part of the answer; among other things, said notice set forth the following, to wit: "Sealed proposals will be received . . . on the 29th day of November, 1902, for the construction of bridges, drops, railroad crossings, and headgates, hereafter particularly described, and according to the plans and specifications of said work and instructions to bidders, which can be seen at the office of said Board. The contract will be let to the lowest, responsible bidders, but the Board may reject any or all bids. The proposals must be in writing and signed by the bidder and must be upon forms furnished by the Board, with blanks properly filled out, and be enclosed in a sealed envelope. . . . Said proposals must be accompanied by a certified check . . . and if such bid is accepted, and the contract awarded to such bidder, and he fails to enter into such contract and to furnish such bond, then his check and the moneys payable thereon, shall be and remain the property of said District. . . . Any person to whom a contract shall be awarded shall, within ten days' notice of such award, make, execute and deliver to said Board a written contract, in form satisfactory to said Board, for the performance of said work, at the time to be specified, in the manner according to and upon the terms prescribed by this notice, such proposal, and said plans and specifications. . . .

"Said work is particularly described as follows:

"The construction of the drops, headgates, bridges and railroad crossings within the boundaries and said irrigation district according to the plans as aforesaid.

"Said bids should specify the price per thousand of lumber, the price of concrete per cubic yard, and of syphon pipe per foot, all in place.

"The work will comprise about 75 drops, 34 bridges, 8 railroad crossings, and 5 headgates.

"Full details of the requirements can be obtained from the said plans and specifications on file at the office of the said Board of Directors."

It is further averred that on November 29, 1902, the several bids or proposals were opened by defendant and plaintiffs presented and delivered to said defendant a bid in writing for the construction of the work advertised in said notice, "which said bid was accompanied by a certified check hereinbefore mentioned, which said certified check is for the amount required in said notice"; that defendant "duly accepted the said bid or proposal in writing of said plaintiffs . . . and awarded the said plaintiffs the contract for the construction of such portion of irrigation work of said district as was set forth in said bid or proposal in writing of said plaintiffs, and thereafter duly notified said plaintiffs of the said acceptance of their said bid, and of the awarding to plaintiffs of said contract"; that by said bid plaintiffs agreed that if not accepted and said contract awarded to them, and in case there was any default on the part of plaintiffs in executing the contract and bond required by said notice, the said check and the money payable thereon should be and remain the property of said district; that plaintiffs have failed and refused to enter into such contract and to furnish the required bond.

The court found "that each and all the facts alleged in the complaint of plaintiffs herein are true as alleged," and "that all the denials in the answer of defendants as appearing are untrue." The court also found "that it is not a fact that said board of directors . . . duly or at all accepted said bid or proposal of plaintiffs. That it is not a fact that said board ever duly or at all awarded to plaintiffs the contract mentioned in said answer, nor any other contract." As conclusion of law, the court found that plaintiffs are entitled to judgment as prayed for, and judgment was accordingly entered. De-

fendants appeal from the judgment, and from the order denying their motion for a new trial.

The findings are challenged as unsupported by the evidence, and, in point of fact, rightly so. The evidence is undisputed that plaintiffs submitted a bid pursuant to the proposals of defendants and put up their certified check as there required, and that the bid of plaintiffs was accepted by defendants and plaintiffs notified thereof, but that plaintiffs refused to proceed further in the matter. The findings and judgment can be sustained only upon the proposition advanced by plaintiffs "that the court found that, in contemplation of law, the whole proceeding was null and void, and the attempted acceptance and award simply nugatory," as, it is claimed, "was the case in *Perine Co. v. Pasadena*, 116 Cal. 6, [47 Pac. 777]." The argument is that appellant is a public municipal corporation, and its officers are public officers (*In re Madera Irr. Dist.*, 92 Cal. 297, 319, 323, [27 Am. St. Rep. 106, 28 Pac. 272]; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 174, [17 Sup. Ct. Rep. 56]); and that "if any of the essential proceedings prescribed by the statute for investing the officers of such a corporation with power to contract be dispensed with, no liability is upon the corporation, by reason of such a contract"; citing *Forest v. Levee Ditch*, 77 Fed. 555; *City v. Morgan*, 65 Ohio St. 219, [62 N. E. 127].

Admittedly, the power given the defendants is found in section 53 of the so-called Wright act (Stats. 1897, pp. 254, 272). Section 53 is as follows: "After adopting a plan for such canal or canals, storage reservoirs and works as in this act provided for, the board of directors shall give notice, by publication thereof . . . calling for bids for the construction of the work, or of any portion thereof; if less than the whole of the work is advertised, then the portion so advertised must be particularly described in such notice. Said notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder; . . . and as soon as convenient thereafter the board shall let said work, either in portions, or as a whole, to the lowest responsible bidder; or they may reject any or all bids and readvertise for proposals, or may proceed to construct the work under their own superintendence."

In *Perine Co. v. Pasadena*, 116 Cal. 6, [47 Pac. 777], a contractor bid for certain work under the street law, and, as required by that law, accompanied his bid by a check subject to forfeiture in case he refused or neglected to enter into a contract if his bid was accepted. He was awarded the contract, but refused to proceed further and brought suit to recover his deposit. It was held that the street law contemplates forfeiture for a failure to enter into a contract based upon legal proceedings of the municipal authorities, but if they are illegal the provision of the contract relating to a deposit is a naked offer without consideration and the bidder is not estopped thereby. It was held also that a discretion lodged in the board of supervisors alone could not be delegated to the superintendent or city surveyor; and, where the specifications of a contemplated street improvement leave it to them to designate what extra concrete shall be put in, thus giving them power to increase the price indefinitely to be paid by the property owner without his having the means of knowing the ultimate cost of the finished work, the proceedings for the improvement are rendered invalid.

Respondents contend that the notice of proposals is jurisdictional by analogy to the notice of intention in the case of street work under the street law, and that the description of the proposed work must be at least as certain as is required under the street law; and, as held in *Patridge v. Lucas*, 99 Cal. 521, [33 Pac. 1082], it must enumerate the different classes of work and enumerate them correctly; and it must, by definite and certain references to specifications, put intending bidders in a position to ascertain definitely what is intended to be required of them.

Appellants contend that there is a wide difference between the object of the notice of intention in the street law and the advertisement or notice for bids in the Wright irrigation law; that the only object of the advertisement is to give notice to intending bidders and does not concern owners of irrigated land in the district. Furthermore, it is claimed that the notice is in no sense jurisdictional, but that the adoption of the plans is the source of the jurisdiction to be exercised.

It is, perhaps, not necessary to decide just how far in all cases the advertisement for bids is jurisdictional or how closely the analogy may be drawn between the notices referred to in the two acts. This much, however, we think may be safely af-

firmed: That while section 53 of the Wright act provides for calling for bids for *the entire work* "after adopting a plan," and does not require in terms that in such case the work shall be particularly described, the act does specifically provide that "if less than the whole work is advertised (which is the case here), then the portion so advertised must be particularly described in such notice." It will be observed that the statute requires that the notice shall set forth that the plans and specifications can be seen at the office of the board, "and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder . . . and thereafter the board shall let *said work*." Clearly, the act contemplates that the work "particularly described in such notice" must agree substantially with the work described in the plans and specifications and must relate to the same work, otherwise the bidders might be misled to their disadvantage by reason of doubts as to which of the two descriptions of the work should be followed.

Whether there be uncertainty in the specifications as to the substantial terms of the proposed contract or a substantial variance as to such terms between the notice to bidders and the plans and specifications, the result would be the same, as is set forth in *Packard v. Hayes*, 94 Md. 233, [51 Atl. 34], where the court said:

"Necessariiy, then, all the essentials that the municipality designs that the contract proposed to be made shall contain is to be determined before proposals are invited, and are to be placed before the bidder as the basis of his bid; otherwise there would be no standard by which bidding could be made with the definiteness and precision which would leave nothing to be done except to ascertain the lowest bid. And it may be said there could be no effective competition in bidding, which it was the evident design of the provisions of the charter we are considering to secure. That proposals for contracts under these provisions should be made by bidders with knowledge of and with reference to all the essential elements of the contract into which they are invited to enter is enforced by other considerations.

"The object of the provisions of the municipal charter we are considering is to prevent favoritism and extravagance in the making of municipal contracts. The effect of those provisions to produce the result intended would be greatly im-

paired, and the purpose of them might be entirely defeated, if the method of awarding contracts under them which was pursued in this case could be sustained. The absence of any definite and precise basis for competition among the bidders, the allowing of each bidder to submit his own independent proposition as to what would form an important element of the contract, and the reservation of a discretion to be exercised by a municipal authority as to an essential of the contract after bids had been submitted, make the contract here the subject of controversy violative of the intent and purpose of the provisions of law in question, as well as of the essential character of competitive bidding." (See, also, *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645, [17 S. W. 7].)

In *Fones Bros. Hardware Co. v. Erb*, the court stated certain principles deemed to be indispensable to competitive bidding: 1. An offering to the public; 2. Opportunity for competition; 3. Basis for exact comparison of bids, i. e., "bidding for the same particular thing to be done according to the same specifications."

It is immaterial that fraud be shown. It is the opportunity for fraud or favoritism that is forbidden. (*Bolton v. Gil-leran*, 105 Cal. 244, 252, [45 Am. St. Rep. 33, 38 Pac. 881].)

What, then, do the facts show? The notice reads: "Said work is particularly described as follows: The construction of the drops, headgates, bridges and railroad crossings . . . according to the plans aforesaid." The plans and specifications included "flumes," "trestles" and "chutes" not mentioned in the notice. The notice called for certain railroad crossings, but the plans showed no such crossings. As to these crossings, it is explained that after the notice was published and before the bids were submitted the bidders were told not to include the railroad crossings in their bids, and plaintiffs did not, in fact, include them in their bid, although one bidder did include them in his offer. The notice speaks of concrete and syphon pipe, no details of which are mentioned in the specifications, nor did the form of bid furnished by defendants provide for them, although one of the bidders included these items in his bid. The drops were the most expensive part of the work, but the plans showed only what was called a "typical drop." This showed the manner of construction, but gave no suggestion as to the amount of ex-

cavation in the seventy-three required or of the nature of the land or its contour where the drops were to be placed. There was a profile of the work, but it was not referred to in the notice as part of the plans and was not furnished with the "set" furnished for plaintiffs' examination. Attention is called also to the omission in the notice to state any time within which the work was to be performed. The notice read "at the time to be specified." The specifications required the successful bidder to execute the contract within ten days from acceptance of his proposal and called for prompt and vigorous work to "the time fixed for the completion of the contract," subject to certain penalties, but nowhere is this time stated. Apparently the time of completion was left entirely discretionary with defendants, and might have been so fixed as to greatly increase the bidders' burdens. It has been held that the time for completing the work should have been stated in the notice. (*Kneeland v. Furlong*, 20 Wis. 437; *Manley B. Co. v. Newton*, 114 Ga. 245, [40 S. E. 277].) It was not stated either in the notice or plans.

The notice stated that the bids should specify the price of certain materials, to wit, concrete and syphon pipe, all in place, but the form of bid furnished by defendants, as already noticed, omitted mention of these materials, from which it appears that the bids were not permitted to include the work advertised for. *Andrews v. Board*, 7 Idaho, 453, [63 Pac. 593], is cited, where the court held that where proposals for a two-span, five hundred foot bridge were called for and a three-span bridge, less than five hundred feet long, was let under the call, the bidding was not competitive. The bid admittedly refers to the notice as well as to the plans and is an offer to construct all the work advertised, including, as we have seen, work which was omitted from the plans. To say the least of these provisions, it is scarcely possible to determine whether the contract should be confined to the work mentioned in the notice, or the proposals or the plans. (*Packard v. Hayes*, 94 Md. 233, [51 Atl. 32, 34].)

Attention is also invited to certain uncertainties in the specifications. Some principles governing in such case have already been adverted to. There being no time fixed for completion of the work opened a wide door for favoritism and precluded the probability, if not the possibility, of a letting to the lowest responsible bidder. It is irreconcilable with fair

dealing to leave it in the power of defendants to fix a time different for a favored bidder from that fixed for one not favored, which might be done in advance of the bidding. It is no answer, as appellants contend, that we must not presume that the officers of the district will violate law. It is not a question of presumption of official honesty and integrity, but a question of opportunity to do wrong that the law guards against. (*Bolton v. Gilleran*, 105 Cal. 244, [45 Am. St. Rep. 33, 38 Pac. 881].)

Turning to specifications numbered 16 and 17, we find an irreconcilable conflict. In 16, provision is made for a change of work from that described in the specifications, but "no material change shall be made unless first agreed on in writing by the board and contractors." In 17, the unqualified right is retained in the district "to change at any time during the progress of the work, the alignment, grades and width of the canal or any part thereof, and also the limits of all sections; or alter the character, vary the dimensions or change of location of structures, or substitute one kind of work or material for another (and many other like powers) . . . without the contract price being thereby affected unless the aggregate value of all work contemplated by the contract be changed fully twenty (20) per cent, in which case a fair allowance either to the district or contractor shall be made (not by the district but) by the engineer." The contractor, however, may "throw up said contract," and the district "may settle with the contractor on the measure of damages he may suffer." Probably these contradictory provisions crept in through an inadvertent commingling of the form of specifications for the entire work with specifications for a part of the whole work. However this may be, the provisions stand unexplained, under which it is hard to conceive how a bidder could safely enter into a contract.

It is also provided in the specifications that "bidders may also submit their own plans and specifications for the whole or any portion thereof," etc. This provision probably came from the form to be used where the whole work under a general plan, or some part of it, was to be bid for, but it is used here and is not explained. In the case of *Ertle v. Leary*, 114 Cal. 238, [46 Pac. 1], it was held that where the law required the contract to be let to the lowest bidder upon plans previously adopted by the board of supervisors, there

is no authority to let a contract upon plans to be submitted by the bidders, thereby preventing competition in the bidding and giving the board an opportunity for favoritism.

In the specifications for "drops" the right was reserved to the engineer "to modify or change the detail of construction." Like reservation was provided as to headgates "and no extra expense allowed for the same." (*Bolton v. Gilleran*, 105 Cal. 244, [45 Am. St. Rep. 33, 38 Pac. 881]; *Perine Co. v. Pasadena*, 116 Cal. 6, [47 Pac. 777]; *Chase v. Scheerer*, 136 Cal. 248, [68 Pac. 768]; *Packard v. Hayes*, 94 Md. 233, [51 Atl. 34].)

In view of the foregoing facts, we think the conclusion of law arrived at by the trial court was correct. The judgment and order are affirmed.

Burnett, J., and Hart, J., concurred.

[Crim. No. 353. First Appellate District.—March 28, 1907.]

RALPH A. HUNTINGTON, Petitioner, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO and WILLIAM P. LAWLOR, Judge, Respondents.

CRIMINAL LAW—CHARGE OF MURDER—ISSUE AS TO DEATH FROM ABORTION—ERROR IN INSTRUCTION—CONVICTION OF MANSLAUGHTER—NEW TRIAL.—Where a defendant charged with murder was tried for the crime of death caused by abortion, and convicted of manslaughter, under an improper instruction on that question, for which error the cause was remanded for a new trial by the supreme court, the conviction for manslaughter, though held erroneous, was an acquittal of the charge of murder, and the new trial must be limited to the charge of manslaughter.

ID.—PROHIBITION AGAINST SECOND TRIAL FOR MURDER—LIMITATION OF PENALTY.—The writ of prohibition will lie to prevent a second trial upon the charge of murder caused by abortion, notwithstanding a proposed limitation of the penalty to manslaughter.

ID.—LIMITATION OF EVIDENCE.—The charge of manslaughter is not included in the charge of death procured by abortion, and cannot be proved by evidence of that offense. It can only be proved by evidence of facts included in the legal definition of manslaughter.

WRIT OF PROHIBITION to the Superior Court of the City and County of San Francisco. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Peter F. Dunne, and Robert Ferral, for Petitioner.

John O'Gara, Deputy District Attorney, for Respondents.

COOPER, P. J.—This is an application for a writ of prohibition to the superior court of the city and county of San Francisco and Hon. William P. Lawlor, judge thereof, for the purpose of prohibiting the said superior court from proceeding with the trial of petitioner for the crime of murder. The facts as stated in the petition, and which must be taken as true for the purposes of this case, are substantially as follows:

In December, 1900, an information was filed in said superior court charging petitioner with the crime of murder, in having feloniously killed one Jennie McKown with malice aforethought on the twenty-seventh day of October, 1900. The defendant was tried before a jury in said superior court, and the trial resulted in a verdict finding petitioner guilty of manslaughter, upon which judgment was accordingly entered, and the defendant was sentenced to imprisonment in the state prison at San Quentin for the term of ten years. Thereafter the case was appealed to the supreme court, and on the third day of January, 1903, that court rendered its decision reversing the case, and remanding it to the superior court for a new trial. (*People v. Huntington*, 138 Cal. 261, [70 Pac. 284].) In the opinion in said case the court said: "The opening statement of the district attorney to the jury was that the deceased was pregnant, and that appellant, while knowingly and intentionally attempting to produce an abortion, caused her death. Counsel for the appellant, in his opening statement, denied that appellant knew deceased was pregnant, or had any intent to produce abortion, but was treating her for supposed disease, and that she died under a surgical operation, probably from the effect of an anesthetic which had been administered. The issue thus presented was the only one suggested at the trial, and the evidence intro-

duced was to the one or the other side of that issue—the only contention of the prosecution being that death occurred while defendant was trying to produce the abortion. . . . Under the circumstances of the case at bar there should have been no instruction on the subject of manslaughter. The only question legitimately before the jury was whether the appellant had caused death while attempting to produce abortion. If that was the fact he was guilty of murder, and there was no element of manslaughter present; but the jury, under the instruction, found him guilty of manslaughter, and he was therefore tried for one crime, and convicted of an entirely different crime.” The *remittitur* duly issued from the supreme court, and was filed in the superior court and spread upon its minutes. Thereupon, in the regular course of proceedings, said cause was set for trial for Monday, the fourth day of March, 1907, in said department No. 11 of the superior court, before the Hon. William P. Lawlor. Upon calling the case for the second trial in the superior court the district attorney answered that he was ready to proceed with the trial, and then and there stated and announced that he would proceed under the information and try the defendant upon the charge of murder in the second degree; and upon his theory being so announced, and upon objection being made by the defendant, the court then and there announced, ruled and determined that the former verdict of the jury in this case did not curtail the power and the jurisdiction of the court to subject petitioner to a second trial upon the information for murder in the second degree, the court holding that the effect of the former verdict was limited to the penalty only, and that the defendant could be tried for murder in the second degree, but, if convicted, could only be sentenced for the crime of manslaughter. The petition further states that the said Hon. William P. Lawlor “announced, ruled and determined that this petitioner would and should be proceeded against on his said second trial under said information for the crime of murder by abortion as aforesaid, and that evidence of his guilt thereof would be admitted by this court; the jury would be instructed that the issue as to his guilt or innocence of said murder by abortion as aforesaid was triable and determinable by them; that in the event that they should determine him to have been guilty of said offense it would be their duty, by force of the former verdict in this case, to

return a verdict of guilty of manslaughter." It is further alleged in the petition that, by reason of the former verdict and judgment in this case, the defendant has been acquitted of the crime of murder either in the first degree or in the second degree, and that the court will exceed its jurisdiction and power in proceeding against this defendant, and trying him for the crime of murder.

To the above petition the district attorney, on behalf of the respondents, has filed a demurrer, alleging that the petition does not state facts sufficient to constitute any ground for the issuance of the writ, and that it does not show want of jurisdiction, or excess of jurisdiction, in the superior court, and therefore the writ should not issue.

While the case is thus presented upon the demurrer to the petition, it is evidently the intention of the parties to have the gist of the matter determined on the demurrer.

The theory of the prosecution in the former trial was that defendant was guilty of murder in the second degree by causing the death of deceased while he was feloniously performing the operation of abortion upon a pregnant woman. The effect of the former verdict of manslaughter was to acquit the defendant of the crime of murder. (*People v. Gilmore*, 4 Cal. 376, [60 Am. Dec. 620]; *People v. Backus*, 5 Cal. 275; *People v. Apgar*, 35 Cal. 391; *People v. Smith*, 134 Cal. 454, [66 Pac. 669].) We are therefore confronted with the proposition as to whether or not the superior court has jurisdiction to try the defendant for a crime of which he has been acquitted in that court and in the same proceeding. We apprehend that if the crimes included in the information in this case had been charged separately—that if the law required it, and there had been three informations filed against defendant—one charging him with murder in the first degree, one with murder in the second degree, and one with manslaughter, the matter would not be contested by the district attorney. Or if defendant had been charged in three several counts in one information, with murder in the first degree, murder in the second degree and manslaughter, and had been acquitted on the counts charging murder, and convicted on the count charging manslaughter, and a new trial granted, that no lawyer would contend that he could be again tried except on the charge of manslaughter. If the information charged manslaughter only, the court would have no power

to try defendant for any other or different crime, whether it be murder, arson, larceny or any other crime mentioned in the Penal Code. It is conceded that defendant cannot be convicted of any other crime than manslaughter under the law in the present status of the case. If he cannot be convicted of any other crime than manslaughter, he should not be tried for any other crime. Evidence should not be received of any other crime than the one under investigation. It is an old rule that the evidence should be confined to the point in issue. A man should not be tried for one crime and found guilty of another and different crime, unless the different crime is included in the charge for which he is being legally tried. Now, in the charge of murder is included the lesser offense of manslaughter; and in a proper case, where the defendant is being tried for the crime of murder, a jury may find the lesser offense of manslaughter; but it does not follow that a defendant can be tried for the same murder of which he has been acquitted. The lesser offense is included in the greater, and may be by the jury carved out of the greater where the trial is legally conducted and for the greater offense; but we know of no case in which it has been held that the court could proceed to try a defendant for an offense of which he has been acquitted. If the contention of the respondents is correct, the evidence in this case might be such as to show beyond doubt that defendant is guilty of murder in the second degree, of which he has been acquitted, and that he is not guilty of manslaughter, but yet the jury may be told that they can find him guilty of manslaughter. He may be convicted of a crime which the evidence shows he did not commit, for the reason that the evidence shows he did commit another crime of which he has been acquitted. Such is not the law. In *People v. Apgar*, 35 Cal. 391, in which the supreme court were discussing the question as to the conviction of a lesser offense being an acquittal of a higher one, the court said: "Upon the principle of these cases the defendant is acquitted of the higher offense charged, *and cannot be again tried for it*, so that the case as to that offense is wholly ended. He was only convicted of the lower offense embraced in the indictment, and if the judgment were reversed he could only be tried for that offense."

In the case of *People v. Bennett*, 114 Cal. 56, [45 Pac. 1013], which is relied upon by the respondents, the chief

justice filed a dissenting opinion, in which the authorities are very fully and logically reviewed, and to which attention is called. The dissenting opinion is not reported in the California Reports, but is found in the 50th Pacific Reporter, page 704. The chief justice, in discussing the question that a defendant, having been convicted of an assault with a deadly weapon, could not upon a new trial be tried for the higher offense of assault with intent to commit murder, said: "As an original proposition it would seem to be beyond dispute that a Court of Record and of superior jurisdiction ought to be held to know what the issue is which it has impaneled a jury to try, and that it is its duty to confine the trial to that issue. The only authority for a new trial is the order made in that very case for a new trial. When that order is limited, either in terms or in legal effect, to one issue it seems absurd to say that the Court must shut its eyes to its own order, and open the case for trial upon all the issues. If this view is correct—as I shall show that it is both upon principle and authority—it follows that there was not upon the second trial of this defendant any question of former jeopardy involved. He was only on trial for assault with a deadly weapon. The charge of assault for murder, of which he had been acquitted, was out of the case as much as if it never had been in the indictment, and so the jury should have been instructed. . . . " And in commenting upon *People v. Gilmore*, 4 Cal. 376, [60 Am. Dec. 620], the chief justice said: "An examination of the whole opinion and of the authorities cited in support of the conclusion reached shows that the language in which the questions for decision were stated was carefully and advisedly chosen; that the point decided was not that the plea of former acquittal should be accepted, and evidence allowed to go to the jury in support of it at the new trial which was ordered, but that the new trial must be confined to the charge of manslaughter." And the learned chief justice in conclusion states: "And from it are deduced the effect and consequence of an order for a new trial in such case, viz.: that such order extends only to so much of the issue as is embraced in the charge of which there was a conviction."

While the dissenting opinion of the chief justice in the Bennett case did not become the law of that case, the views and reasoning were afterward adopted, and became the law in *People v. Smith*, 134 Cal. 454, [66 Pac. 669], where the

opinion was delivered by the chief justice, and it was held that where defendant was charged with murder and convicted of manslaughter he was thereby acquitted of the crime of murder, and upon the conviction of manslaughter being reversed, he could only on the second trial be tried upon the charge of manslaughter, and was only entitled to ten peremptory challenges, and not to twenty, which he would have been allowed in a trial where the charge was murder. Attention is called to the many cases cited in this later opinion, and to the language of the chief justice, in which he said: "The information had, as above stated, originally charged the crime of murder, which of course included a charge of the lesser grade of homicide—manslaughter. But the verdict and judgment convicting the defendant of manslaughter was in legal effect an acquittal of the crime of murder, and eliminated that part of the charge from the information, leaving only the accusation of manslaughter pending; and when a new trial was ordered by this Court it was only a new trial of the pending issue that was intended, and its only effect was to subject the defendant to a new trial on the charge of manslaughter."

If the law as stated by the court, speaking through the chief justice, is correct, it is difficult to conceive upon what theory a defendant can be tried for a crime which has been eliminated from the information.

Reliance is placed upon the later case of *People v. McFarland*, 138 Cal. 481, [71 Pac. 568, 72 Pac. 48], in which the opinion was delivered by Mr. Commissioner Chipman. There are some expressions in that opinion that, taken by themselves, are in conflict with what has here been said; but it will be noted in that case that the opinion commences by stating that the defendant pleaded "Not guilty," a former acquittal of the offense of murder, and also that he had been once in jeopardy. The opinion further states that the circumstances show a conflict as to who was the aggressor, and the facts are divergent as to whether the deceased or the defendant fired the first shot. In such case it is very clear that the facts and circumstances connected with the homicide would have to be given in evidence, whether the defendant was charged with murder or manslaughter, which plainly distinguishes the case from the case at bar.

In the case at bar the defendant, as stated in *People v. Huntington*, 138 Cal. 261, [70 Pac. 284], which has become the law of this case, is charged with murder by reason of causing death while attempting to commit a felony, to wit, an abortion. We think that causing death in such manner would not come within the definition of manslaughter as contained in the Penal Code, section 192. Manslaughter is there defined to be the unlawful killing of a human being without malice, and is divided into two kinds: First, voluntary, upon a sudden quarrel or heat of passion; second, involuntary, in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death in an unlawful manner, or without due care and circumspection. As the charge of murder in the second degree includes that of death caused by a defendant while committing or attempting to commit a felony, it does not necessarily include death caused in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act in an unlawful manner without due care or circumspection, or inflicted in a sudden quarrel or heat of passion. It was accordingly held in *People v. Balkwell*, 143 Cal. 259, [76 Pac. 1017], that the lower court in the trial of the case—which was a charge of murder claimed to have been committed in performing an abortion, did not err in refusing to give an instruction to the effect that the jury could convict of manslaughter. The court, by holding the refusal of the instruction not to be error, in effect held that manslaughter was not included in the charge under consideration.

It is contended that the writ of prohibition will not lie because the superior court of the city and county of San Francisco has jurisdiction to try the defendant for the crime charged in the information. This is true as to the crime of manslaughter which is now charged in the information. As to that charge, and the evidence and the rulings to be made by the court, we cannot and will not interfere by the writ of prohibition; but the court has no jurisdiction to try the defendant for any other or different crime than that of manslaughter. In *Hayne v. Justice's Court*, 82 Cal. 284, [23 Pac. 125], it was held that a writ of prohibition would lie to prevent the justice's court from proceeding to the trial of a cause against the express prohibition of a statute. The justice's court in that case had jurisdiction of the parties and

the subject matter; but the statute provided that an order of adjudication in insolvency should stay proceedings in all actions pending in the justice's court. The court held that the prohibition of the statute extended to the justice's court, notwithstanding the fact that it had jurisdiction of the person and of the cause of action. The court said, in speaking of the statute: "This is a plain and direct prohibition against any further proceedings in the justice's court." Equally mandatory is the language in *People v. Smith*, that the "only effect was to subject the defendant to a new trial on the charge of manslaughter." In *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315, it was held that the writ of prohibition would lie to restrain a judge from proceeding in an action in which he is disqualified by reason of interest, although the court over which he presided had jurisdiction of the cause. The case was decided upon the theory that the judge, by reason of his interest, was prohibited by the statute from trying the case.

By analogy we conclude that the superior court is prohibited by reason of the law from trying the defendant for any other offense than that of manslaughter. It follows that the demurrer to the petition must be overruled, and it is so ordered.

The respondents will be allowed ten days in which to show cause by answer why the writ should not be made peremptory, and in default of such answer on the part of the respondents the writ to become absolute.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 332. Second Appellate District.—March 29, 1907.]

JESSE KNIGHT, Trustee, Respondent, v. EMILIE G. COHEN and WILLIAM COHEN, Appellants.

INJUNCTION—PRELIMINARY ORDER—PURPOSE—MERITS NOT INVOLVED.—

A preliminary injunction is granted before a hearing on the merits has been had, and its purpose and sole object is to preserve the subject in controversy in its then existing condition, and, without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right

in controversy may be materially injured or endangered until a full and deliberate investigation of the case is afforded to the party. Cases are not tried on their merits on pleadings and affidavits.

ID.—CONVERTED RIGHT AS TO PIPE-LINE—DESTRUCTION OF RIGHT—DISCRETION.—Where the defendant admits the existence of a pipe-line used by plaintiff as a trustee for other owners of lands irrigated thereby, to be used by plaintiff on his own lands and those of other beneficiaries in trust for irrigation and domestic use, and the plaintiff asserts a user adverse to defendant for more than six years, and defendant claims that it existed under her license, which has been revoked, for the court to have allowed the destruction of the rights claimed by plaintiff preliminary to a hearing on the merits by regular trial in court would have been an abuse of discretion.

ID.—APPEAL—RESTRAINING ORDER—MERGED IN PRELIMINARY INJUNCTION.—It seems that an appeal will not lie from an order denying a motion to dissolve a restraining order, or from an order denying a motion to discharge the same. Upon the hearing of the order to show cause why a preliminary injunction should not be granted, the restraining order falls with a denial of the injunction, and is merged in it if granted.

APPEAL from orders of the Superior Court of Los Angeles County denying defendants' motions to dissolve a temporary restraining order, and to discharge said restraining order denying defendants' motion for an injunction *pendente lite*, and granting plaintiff a preliminary injunction *pendente lite*. W. P. James, Judge.

The facts are stated in the opinion of the court.

J. J. Scrivner, Alfred H. Cohen, and Lawler, Allen & Van Dyke, for Appellants.

Munson & Barclay, W. S. Wright, and Anderson & Anderson, for Respondent.

TAGGART, J.—An appeal from four orders relating to applications for provisional injunctions made by both plaintiff and defendants, to wit: 1. From an order denying defendants' motion to dissolve a temporary restraining order issued on plaintiff's *ex parte* application; 2. From an order denying defendants' motion to discharge said restraining order; 3. From an order denying defendants' application for an in-

junction *pendente lite*; and 4. From an order granting plaintiff a preliminary injunction *pendente lite*.

Plaintiff is the owner of certain lands lying in Snover canyon, immediately above and adjoining certain lands owned or claimed by defendants. In his verified complaint plaintiff alleges that he is the owner of and holds in trust for certain persons named said lands and a certain pipe-line used in conducting waters from his said lands over and across the lands of defendants to the farming neighborhood in and about La Canada, there to be used by plaintiff and other beneficiaries of said trust and to be sold for irrigating purposes and domestic uses to the farmers and ranchers of that place; and, that he has maintained said pipe-line across defendants' land, adversely to them, for more than six years. That plaintiff and the other parties for whom he holds said land, pipe-line, and water in trust, own orange groves in and about La Canada, and the use of said water is essential to the proper care and growth of said orange groves and the maturing of the fruits thereof. That defendants threaten to and will, if not restrained, cut said pipe-line and prevent the said waters from flowing through the same to the said orange groves, thus causing the destruction of the latter. On this verified complaint and an affidavit of plaintiff the superior court issued a temporary restraining order and an order to defendants to show cause why a preliminary injunction restraining them from interfering with plaintiff's said pipe-line during the pendency of the litigation should not issue from said court.

Prior to the hearing on the order to show cause defendants filed and served a notice of motion to dissolve the said restraining order and to grant defendants an injunction *pendente lite* enjoining plaintiff from maintaining the pipe-line across defendants' land or using the waters on plaintiff's land, which were being conducted through said pipe-line, or entering upon defendants' land to repair or remove said pipe-line therefrom. In support of these motions defendants served and filed an answer and cross-complaint on behalf of said defendant Emilie G. Cohen. By the answer the ownership of the pipe-line on defendants' land and the adverse maintenance thereof by plaintiff are denied, and it is averred that the carrying of said waters through said pipe-line by plaintiff was by license and permission of defendants, which license and permission have been revoked. That the said waters are carried to non-

riparian lands to the injury and detriment of defendants' riparian rights to the waters of said Snover canyon. By her cross-complaint said defendant Emilie G. Cohen sets up an ownership of the waters of the spring upon plaintiff's land (being the waters conducted by him through his said pipe-line) by virtue of a prior appropriation made while said lands were unoccupied lands of the United States government, and that the same are necessary for the irrigation of her agricultural lands and for her domestic use. That plaintiff acquires the said waters by diverting the same from the said spring by means of a tunnel projected into the formation underneath said spring. That plaintiff's said pipe-line across defendants' land was constructed and maintained under a license and permission from said defendant and her predecessors in interest, and that on the fifteenth day of April, 1905, defendant revoked said license and notified plaintiff that he might remove said pipe-line if removed before April 22, 1905. That plaintiff did not so remove said pipe-line or cease to use such right of way across the lands of cross-complainant, but threatens to continue to maintain the pipe-line and use the right of way without consent or permission of defendant. That the further maintenance of said pipe-line by said plaintiff and his associates is highly detrimental and injurious to the riparian rights of the cross-complainant. An injunction is asked restraining plaintiff from maintaining the pipe-line, carrying away the waters of the spring, or removing the pipe-line from defendants' land. A number of affidavits accompany the answer and cross-complaint setting out cross-complainant's source of claim to said waters, and statements, proceedings, occurrences and conditions tending to show that plaintiff never claimed any right to maintain said pipe-line adverse to cross-complainant.

Plaintiff answered said cross-complainant and filed certain affidavits contradictory of the material averments in the affidavits filed by defendants in support of their motion for a temporary injunction.

These matters and motions were all presented to the superior court at one hearing, the pleadings, affidavits and papers were read and submitted to the court; and the act of the court assigned as error is thus set out in the record: "Counsel for the defendants proceeded to argue said cause upon its merits, both as to the fact and the law of the case, and that after defend-

ants' counsel had proceeded at some length, the court interrupted counsel for the defendants in his said argument and stated that after the reading of said papers, it appeared to the court that it was not necessary or expedient that he should consider and determine the merits of the case, either as to the law or the fact, for that it appeared to him that the plaintiff would be damaged in a far greater degree by the granting of the motion to dissolve the restraining order or by discharging the order to show cause, or by refusing to grant plaintiff's temporary injunction *pendente lite*, than the defendants would be if the motions of the defendants and the relief sought by them were granted," and thereupon made the ruling excepted to and appealed from.

That the course pursued by the superior court, and the reasons assigned by it for its acts show a proper exercise of discretion does not require the citation of authority to sustain. Provisional remedies of all kinds are intended by the law to be used for the maintenance and preservation of the status of the property or persons involved in the litigation, so that the judgment of the court when given or made may be effectually carried into execution. A preliminary injunction is no exception to the rule. It was not necessary for the court to decide the merits of the controversy in favor of the plaintiff to support its order granting him a preliminary injunction. Cases are not tried on their merits upon pleading and affidavits. A preliminary injunction is granted before a hearing on the merits has been had, and its purpose and sole object is to preserve the subject in controversy in its then existing condition, and without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered until a full and deliberate investigation of the case is afforded to the party. (16 Am. & Eng. Ency. of Law, p. 345.)

Here the defendant admits the existence of the pipe-line, the use of the water, and its necessity to plaintiff, but says it all existed under her license and that she has revoked this. Whether the right exists by adverse user or by permission is the question at issue, and its destruction preliminary to a hearing on the merits by regular trial in court would have been an abuse of discretion by the trial court.

Therefore, the rulings of the trial court on the motions made should be affirmed. We do not, by this ruling, however, desire to be understood as holding, even impliedly, that an appeal will lie from the order denying the motion to dissolve the temporary restraining order, or that the order which is designated as an order denying defendant's motion to discharge said restraining order is appealable. Neither of these are expressly made appealable by the code. Upon the hearing of the order to show cause and the action of the court thereon, the restraining order ceased to have any effect. An order dissolving or discharging a restraining order in such a case is not necessary, and it falls with a denial of the motion for a preliminary injunction, or becomes merged in the latter if granted. (*San Diego W. Co. v. Steamship Co.*, 101 Cal. 218, [35 Pac. 651].)

Orders appealed from affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 264. Third Appellate District.—March 30, 1907.]

WELLS, FARGO & COMPANY, Respondent, v. JAMES P. MCCARTHY et al., Appellants.

PLEADING—SUFFICIENCY OF COMPLAINT—REVIEW UPON APPEAL.—The sufficiency of a complaint to support the judgment must be reviewed on an appeal from the judgment.

ID.—COMPLAINT UPON FORECLOSURE OF MORTGAGE—SUFFICIENCY OF AVERMENT OF OWNERSHIP—ASSIGNMENT BY EXECUTRIX—PRESUMPTION UPON APPEAL.—Where a complaint upon the foreclosure of a mortgage alleged an assignment by the executrix of the will of a deceased person, "pursuant to order duly made in the matter of the estate" of such deceased person, without averring specifically what order was made in such matter, and also alleged an indorsement and delivery of the note to plaintiff by the executrix without recourse, and that plaintiff has ever since been, and now is, the holder and owner thereof, it must be presumed in favor of the judgment, in the absence of a bill of exceptions, that it was shown without objection that an order of sale and an order confirming the sale were properly made by the superior court, and that the cause was tried on the theory that the complaint was sufficient, and techni-

cal objections raised for the first time on appeal must be disregarded.

ID.—ATTEMPT TO ALLEGE ORDER OF COURT—LEGAL CONCLUSION—ULTIMATE FACT OF OWNERSHIP ALLEGED.—There being no attempt to allege the orders of the court, even if the allegation relative thereto be deemed a mere legal conclusion and surplusage, the allegation of ownership of the note and mortgage should be construed as an averment of an ultimate fact sufficient to supply the defect and to support the judgment.

ID.—PROPOSED AMENDMENT BY SUBSEQUENT LIENHOLDER—NOVATION—STATUTE OF LIMITATIONS—DISCRETION.—The court did not abuse its discretion in refusing to permit an amended answer to be filed more than four years after issue joined, so as to plead a novation of the indebtedness on the note and mortgage, which was barred by the statute of limitation as against a subsequent lienholder, and thus defeat the plaintiff's mortgage and unjustly assert priority of defendant's lien thereto.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Bishop, Wheeler & Hoefler, for Appellants.

E. S. Pillsbury, for Respondent.

BURNETT, J.—This action was brought to foreclose a mortgage. There were over one hundred defendants. Judgment was rendered in favor of plaintiff for nearly \$200,000, and for the sale of the property. The pleadings are numerous and quite voluminous, covering about four hundred and fifty pages of the transcript. Certain of the defendants, not including McCarthy, the maker of the note, moved for a new trial on a bill of exceptions. The motion was denied. They appeal from the order denying their motion for a new trial, and also from the judgment.

By appellants two points are urged for reversal. One relates to the sufficiency of the complaint and must therefore be considered on the appeal from the judgment. (*Swift v. Occidental Min. etc. Co.*, 141 Cal. 164, [74 Pac. 700]; *Sharp v. Bowie*, 142 Cal. 462, [76 Pac. 62]; *Jensen v. Will & Finck Co.*, 150 Cal. 398, [89 Pac. 113].) The other point is involved in

a ruling of the trial court made during the progress of the trial, denying the application of the appellants to file an amended answer. We shall endeavor, as far as practicable within reasonable limits, to notice the suggestions and citations of counsel in support of their respective contentions.

There was a demurrer to the complaint, general and special. The special demurrer, however, was not addressed to the particular defect herein ably and vigorously assailed by appellants. The portion of the complaint which is the "storm-center" of the contention of the parties is as follows: "On or about the first day of February, 1894, pursuant to an order theretofore duly made by the said Superior Court in the matter of the estate of said Leland Stanford, deceased, the said Jane L. Stanford, as executrix of the last will and testament of Leland Stanford, deceased, for and in consideration of the sum of one hundred and twenty-one thousand and thirty and 36-100 dollars paid to her by this plaintiff on the said first day of February, 1894, executed and delivered to this plaintiff an instrument in writing, whereby she assigned to this plaintiff the said fourth promissory note, and all moneys due and to grow due thereon, and the said mortgage executed and delivered to the said Leland Stanford, on the 5th day of January, 1891, by the said James P. McCarthy, as aforesaid. Thereafter, to wit, on the same day, the said Jane L. Stanford, as such executrix, acknowledged the said assignment before Eugene W. Levy, a notary public in and for the city and county of San Francisco, so as to entitle the said assignment to be recorded, and thereafter, to wit, on the 13th day of February, 1894, the said assignment was recorded in the office of the County Recorder of the said city and county, in Liber 16 of Assignments of Mortgages, beginning at page 330. At the same time with the execution and delivery to this plaintiff by the said Jane L. Stanford of the said assignment, as aforesaid, she also endorsed and delivered to this plaintiff the said fourth promissory note, without recourse, and this plaintiff ever since then has been, and now is, the holder and owner thereof."

It is contended by appellants that the facts alleged do not show that the estate of Stanford ever parted with the title to the obligation, and hence that no cause of action is stated in behalf of plaintiff. The proposition is sound and will not be gainsaid that there must be some allegation sufficient, accord-

ing to the rules of pleading, to show title in plaintiff or else the general demurrer should have been sustained. The difficulty is in making an application of the elementary principles to the particular facts of the case.

To be more specific, appellants urge that "where title to a chose in action is deraigned through a transfer alleged to have been made by an executrix, the complaint must show: 1. A power of sale conferred by will, or by an order of sale; 2. A sale pursuant to the power; 3. A confirmation of sale." Assuming that the order of court to which reference is made in the complaint refers to the order of sale, then it follows, according to appellants' argument, that there is no allegation whatever of the order of confirmation and that therefore one of the essential links in the chain of title is lacking. Section 1517, Code of Civil Procedure, is involved, which provides: "No sale of any property of an estate of a decedent is valid unless made under order of the Superior Court, except as otherwise provided in this chapter. All sales must be under oath reported to and confirmed by the court before the title of the property sold passes." It is not controverted that the case at bar does not fall within the purview of the exception mentioned in said section.

In *Lindsay v. McInerney*, 62 N. J. L. 524, [41 Atl. 701], it is declared: "With certain exceptions, not now pertinent, title and estate must always be pleaded with fullness and particularity. When claim is made by the assignee of a chose in action assignable at law by suit thereon in his own name, the fact of the assignment must be pleaded by direct averment." But, as well pointed out by respondent, in the *Lindsay* case, the fact was as stated by the court in its opinion: "No assignment of the bond is *averred* or can be *gathered* even by *inference*. In the stating part of the pleading there is, generally, but not always, added to the name of Murphy, where occurring, the designation 'assignor as aforesaid,' and to that of the plaintiff the designation 'assignee as aforesaid,' *but there is no averment, direct or indirect, of any assignment of the bond.* . . . For want of such averment, this declaration must fall." The principle of the case is undoubtedly sound, but the situation was manifestly different from what is disclosed by the complaint herein.

The scope of *Stevens v. Bowers*, 16 N. J. L. 16, is shown by the following quotation: "The plaintiff declares on a bond

made to two and sets out a title to it derived from one of them *only*, without showing how he became the sole owner, or by what authority he undertook to assign the whole bond."

In *Smith v. Dean*, 19 Mo. 63, it is held that in an action upon a bond by an assignee, a general allegation that the plaintiff is the legal holder is insufficient. The court said: "The plaintiff must state facts that give him the title to the bond, when, upon its face, the title appears to be in another."

White v. Brown, 14 How. Pr. 282, is somewhat similar. It was an action upon a promissory note. The payee in the note was William Rork and the only allegation connecting the plaintiff with the obligation was that he was then the *bona fide* owner and holder of the said note. The court said: "The complaint in this action does not show any title in the plaintiff to the note set up in it, as an indorser, or a party to the note or any right as such to maintain an action upon it." Hence, the demurrer was sustained. The last two cases are more directly in point than some of the others, but the allegations of the complaint in each were manifestly not so comprehensive as in the case at bar.

In this connection it is contended that the allegation of the execution of the assignment by the executrix is not sufficient because such execution by the executrix in the absence of an order of confirmation conveys no title. This doctrine is clearly established and must follow from the provisions of said section 1517, Code of Civil Procedure, and it has been so declared by the supreme court in *Horton v. Jack*, 115 Cal. 29, [46 Pac. 920]: "No sale of any property of the estate of a deceased person passes any title unless it is confirmed by the probate court. . . . Whether or not, then, this sale was, in fact, made to satisfy a debt of the estate, it is clear that neither the sale nor the supposed payment was sanctioned by the probate court, and that, therefore, the title to the property remained in the estate." (See, also, *Wickersham v. Johnston*, 104 Cal. 407, [43 Am. St. Rep. 118, 38 Pac. 89]; *Bovard v. Dickenson*, 131 Cal. 162, [63 Pac. 162].)

Again, it is urged that the allegations as to the order—admitting it to refer either to the order of sale or of confirmation—is utterly insufficient because it is not a positive averment, but at most presents the facts by way of recital or as a legal conclusion. Certain cases are cited to show the insufficiency of this method of disclosing a material fact.

In *Christy v. Dana*, 42 Cal. 178, the court said: "On examining the answer, we find no new matter which was material. It avers, it is true, that the plaintiff's debt was *barred by the discharge in insolvency, but that is only a conclusion of law and not a fact.*"

It is manifestly so, but that it was immaterial in that particular case is shown by the following declaration of the court: "It is evident the plaintiff was entitled to enforce his mortgage as against the land, *notwithstanding the personal liability of Dana for the debt may have been barred by the discharge.*"

In *Wheeler v. West*, 71 Cal. 127, [11 Pac. 871], the answer, among other things, averred: "That these defendants . . . were actually engaged in working and mining said part of said claim, pursuant to a contract and agreement between plaintiffs and themselves." In support of this averment, over the objection of plaintiffs, evidence was received of a verbal contract between the parties. The objection was made upon the ground "that no contract was pleaded in the answer, and no issue raised on any contract." The court said: "A contract relied upon as a cause of action or defense to an action should, where opportunity is afforded, be pleaded either *in haec verba* or according to its legal intendment and effect. The attempted plea of the contract by defendant was by way of confession and avoidance of the wrongful acts charged in the amended complaint, and as pleaded amounted to no more than a conclusion of law. The objection to the evidence should, therefore, have been sustained." The circumstance that objection was made to the evidence differentiates that case from this. In the case at bar, all intendments being in favor of the judgment and the bill of exceptions not purporting to give the testimony or the proceedings except as bearing upon the question of amendment, hereafter considered—it must be presumed, if required to uphold the judgment, that it was shown, *without any objection whatever*, that an order of sale and an order confirming the sale were properly made by the superior court. It is true appellants filed a demurrer, but they should have objected to the evidence, in view of the nature of the defect complained of in the complaint, in order that plaintiff, if so advised, might have amended its pleading. Considering the condition of the record, it must be assumed that the cause was tried upon the theory that the complaint was sufficient,

and it is proper to invoke the rule to the effect that technical objections raised for the first time on appeal must be disregarded. (*Greiss v. State Investment Co.*, 98 Cal. 242, [33 Pac. 195]; *Abner Doble Co. v. Keystone*, 145 Cal. 490, [78 Pac. 1050].)

Appellants earnestly contend that this consideration injects into the case a false quantity, that the presumption if indulged is utterly without importance because nothing can aid a complaint which fails in a material and necessary averment. It is true that it is of no consequence whether such evidence was admitted without objection or not if there is an absolute failure, and no attempt to allege some material fact, but it is held by the authorities that it does become of moment when there is an imperfect exhibition in the complaint of such fact, which is the case here.

In *Burkett v. Griffith*, 90 Cal. 531, [25 Am. St. Rep. 151, 27 Pac. 527], the rule is stated as follows: "Argumentative pleading is no more permissible under the code than it was at common law. *Matters of substance must be alleged in direct terms, and not by way of recital or reference.* Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." In that case the demurrer was both general and special. It was sustained by the trial court and upheld by the supreme court. The complaint was radically defective in several respects, and the ruling was undoubtedly correct.

In *People v. Jones*, 123 Cal. 299, [55 Pac. 992], it is declared: "It is a rule of pleading, both in civil and criminal actions, that the lack of direct and positive averments of a fact cannot be supplied by intendment or implication, and where the fact is stated only *argumentatively*, or by way of recital or reference, it is insufficient." In that case, the recital condemned was: "R. A. Jones, acting as the agent of said Kempling and wife." No doubt the court stated the general rule correctly, but it seems that it was not necessary to the decision, because the court proceeds: "But aside from this view of the matter, we cannot regard the answer of defendant as constituting perjury." So that the demurrer was, in view of the court, properly sustained independently of the formal defect in the allegation of the agency.

In the case of *Knox v. Buckman Contracting Co.*, 139 Cal. 598, [73 Pac. 428], the supreme court enforces the rule in reference to the allegation of nonpayment of promissory notes which was held controlling in former cases. It is there stated: "The action is upon several promissory notes, but the only averment in the complaint as to a breach of appellant's contract to pay any one of the notes is this: 'That the whole of said note is owing from said defendants to said plaintiff.' It has been frequently held by this court that such an averment is not an averment of the fact of nonpayment, and that a complaint in such a case which contains no other averment as to nonpayment does not state facts sufficient to constitute a cause of action." No doubt the court felt constrained by its former decisions in that particular class of cases, although it must be admitted that the rule is greatly relaxed in the case of *Penrose v. Winter*, 135 Cal. 289, [67 Pac. 772], wherein, as stated in the syllabus, it is held that: "In an action to foreclose a mortgage, an averment in the complaint that a specified sum is 'now due and owing,' *though the statement of a legal conclusion*, in which the material fact of nonpayment is implied, is sufficient to sustain a judgment by default." And, furthermore, in the discussion of that case by the learned chief justice, he submits some reflections directly applicable to the case at bar: "The second objection to the judgment is that the complaint shows the note and mortgage to have been given to John S. Craig, described in both instruments as the guardian of Ora and Rebecca Eiler, minors, etc.; that this shows that Craig had the legal title to the note, *and there is no allegation of an assignment to plaintiff*. This objection, I think, is answered by the same reasoning that answers the objection that there is no allegation of nonpayment. It is true there is no direct allegation of an assignment, but there is an allegation which implies an assignment. It is alleged that the plaintiff, as the guardian of said minors, and as successor of Craig, etc., is now the lawful owner and holder of the note and mortgage. If an assignment was necessary to make plaintiff the lawful owner and holder of the mortgage, then he has alleged a legal conclusion which implies an assignment, and this after judgment by default is sufficient to support the judgment. It may be added that the objection last considered would come with more force from the maker of the note and mortgage than from the appellant." The logic of the opinion

and of some others which will be considered is that under certain circumstances the allegation of what is usually regarded as a *legal conclusion* supplies the want of an averment of a material fact, and renders the judgment safe from attack on the ground that the complaint does not state facts sufficient to constitute a cause of action. What difference in this respect can there be between a default judgment and a judgment after trial? It needs no citation of authorities to support this proposition—and, indeed, it is so implied in section 434, Code of Civil Procedure—that the objection of insufficiency of facts can be made at any time. The defendant is not required to appear in the trial court and file a demurrer in order to make the objection available, and if the objection can be made at any time while the cause is in the course of adjudication, it can be made with equal force after judgment in the trial court as before. And if the allegation of a legal conclusion is an answer to the objection when made after judgment by default, it must be a sufficient answer when the objection is raised by a general demurrer before trial. Mr. Justice McFarland was undoubtedly correct in his dissenting opinion in the Penrose case, *supra*, in the following statement: "And, of course, the objection that a complaint does not state facts sufficient to constitute a cause of action may be taken at any time. Such an objection is not waived by default." Again, in the case at bar, it would seem to be sacrificing the spirit of the law to the letter to hold that the allegation that the plaintiff is the owner and holder of the note is simply a conclusion of law, and must be entirely disregarded, because, perchance, the plaintiff has attempted, although ineffectually, to allege certain facts by virtue of which he has become such owner and holder. That course would be rather to allow technical objections to the judgment "to prevail against its substantial justice." Every purpose of orderly and correct procedure would be subserved by holding that the allegation of ownership is that of an ultimate fact, notwithstanding an attempt to deraign title. If necessary to inform the antagonist of the source or grounds of plaintiff's title, more specific allegations should be required when the complaint is challenged by a special demurrer or a motion to make more certain if the latter pleading is to be countenanced. The reason for holding that an allegation of ownership is sometimes regarded as a conclusion of law, as stated in *Gruwell v. Seybolt*, 82 Cal.

7, [22 Pac. 938], is as follows: "Where, however, the pleader sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated, and will not cure any defect in the chain relied upon. It will be presumed that every fact has been alleged which can be proven." If when an attempt is made to deraign title the reason for holding that an allegation of ownership is a legal conclusion is based upon the presumption that every fact has been alleged which can be proved, the reason of the rule fails, and, therefore, the rule itself does not apply when, instead of facts, conclusions of law are alleged in the deraignment of title. There is here an attempt to allege the orders of the court. If the allegation respecting them should be considered a mere legal conclusion, then the allegation of ownership should be construed as an averment of a fact and sufficient to uphold the judgment.

The case of *Marsh v. Superior Court*, 88 Cal. 596, [26 Pac. 962], cited by appellants, is manifestly different. There it is held that "the averment that the petition filed in the superior court asking for the removal of the said Whiteside 'contained no allegation of any legal cause why said Whiteside should be removed' is but the statement of a conclusion of law, and is not equivalent to a direct allegation that said petitioner did not charge that said Whiteside had violated or was unfit to execute the duties of trustee under said deed of assignment." "Legal cause" is necessarily the deduction from some act, event or circumstance, while "owning," and especially "holding" describe and imply an act, event and circumstance. Can it be said here that there is an entire absence of averment of the transfer of title from the estate of Stanford to plaintiff, so that no evidence could be received of that fact at the trial? We must answer that question in the affirmative to reverse the judgment on the ground of the insufficiency of the complaint. Respondent, in its opening brief, claims that "pursuant to an order theretofore duly made," etc., does not refer to the order of sale, "but concisely pleads the ultimate fact of the order pursuant to which the transfer was and alone could be made, that is to say, the order of confirmation." In its supplementary brief, the position is shifted, and it is contended that it refers to the order of sale. But it only illustrates the element of uncertainty involved in the form of expression. It is uncertain whether it refers to one or the other, and for

that reason is subject to a special demurrer. But does the fact that it is in the form of a recital, or in the nature of a legal conclusion, preclude the court from considering it in order to uphold the judgment as against a general demurrer?

In *Hill v. Haskin*, 51 Cal. 177, it was contended by appellant that the complaint was radically defective because it did not aver an offer to account, on the ground that this was a condition precedent to the right to maintain an action. The supreme court said: "But inasmuch as the plaintiff could not legally demand payment of the defendant until he had first offered to account, the averment that '*he made due demand*' is a sufficient allegation in the absence of a special demurrer to let in proof of the offer to account. It was but a defective statement of a material fact. Instead of alleging the fact directly, it was stated only inferentially, and might have been demurred to on this ground. . . . But, having proceeded to trial without interposing the objections, it was too late afterward for the defendant to raise the point that the offer to account ought to have been averred with greater precision and directness." It is somewhat difficult to see how an allegation that he made due demand is even an imperfect attempt to state that he "offered to account," but the decision indicates a just and wise purpose of the higher court to avoid technicalities in furtherance of justice.

In *Chase v. Evoy*, 58 Cal. 352, an allegation that "the claim was duly verified by the oath of plaintiff in the *form prescribed by law*" was held to be sufficient as against a general demurrer.

In *Grant v. Sheerin*, 84 Cal. 198, [23 Pac. 1094], it was alleged that "plaintiff as such executrix has demanded from defendant an accounting of said sale and the payment to her of the purchase price of said monument. And defendant has refused, and still refuses, to account for or pay the same or any part thereof." There was no allegation, except inferentially, of nonpayment. The supreme court, however, said: "In our opinion, the complaint in this case stated a cause of action, and it was sufficient when tested only by a general demurrer."

From *Alexander v. McDow*, 108 Cal. 29, [41 Pac. 24], we make this quotation: "Thus, while a judgment will not relieve from the entire absence of a necessary averment, it will cure defects in all such averments as may by fair and reasonable

intendment be found to have been pleaded although defectively. The gravamen of the charge against the complaint is that it fails to make the necessary averment of assignment to plaintiff. . . . Assignment of it (the note), therefore, became necessary to convey title. But such an instrument may be assigned by indorsement as fully as may a negotiable instrument. The assignment is pleaded in the complaint with Caesarian brevity by the single word *indorsed*, followed by the quotation (Pay to Jules Alexander. Levy and Alexander). This, however, is aided by the subsequent statement that the principal and interest are due from defendant to plaintiff. By fair, if not by necessary, implication, we learn from this that Levy and Alexander assigned the instrument by indorsement and delivered it to plaintiff, and that plaintiff then became and now is the owner and holder of it. So construed the complaint will support the judgment, although"—Mr. Justice Henshaw somewhat facetiously, but significantly, remarks—"it must be added that the weight is about all it is capable of sustaining."

And in *City of Santa Barbara v. Eldred*, 108 Cal. 297, [41 Pac. 410], the supreme court, speaking through Mr. Justice Temple, states the rule as follows: "The action was brought to collect a municipal tax, and to the complaint a general demurrer was interposed. It was overruled and defendant answered. He now specifies a great many alleged defects in the complaint. Many of them are, in effect, that the complaint is ambiguous or uncertain. Such objections cannot be reached on general demurrer. Nor can the other objections, which merely amount to criticisms upon the sufficiency of the statement, as that the essential facts *appear only* inferentially, or as *conclusions of law* or by *way of recitals* prevail on *such demurrer*. *There must be a total absence of some material fact to justify us in sustaining a demurrer of this character.*" This decision is severely criticised by appellants. They declare it to be against every other authority in England or America, in holding that a conclusion of law may protect a complaint from the attack of a general demurrer. It may be that other decisions do not so hold in so many words, but there are well-considered cases holding in effect that where there is an ineffectual attempt to deraign title the allegation of "holding and ownership" may be regarded in the determination of the question whether the complaint states a cause of

action. We have already cited two of those cases from this state. There is, no doubt, some inconsistency shown in the judicial literature upon this subject, but the later cases hold as we have stated.

In *Estate of Behrens*, 130 Cal. 416, [62 Pac. 603], as stated in the syllabus, it is held that "upon the contest of the probate of a will, the description of the contestants as 'brother and sister and heirs at law' of the deceased, in the introducing sentence of their opposition to the probate, without any direct averment of their heirship, constitutes an inferential averment thereof, which, in the absence of a demurrer to the opposition, will be held sufficient after judgment." It is true there was no demurrer to the opposition, but the same result must have been reached in the presence of a general demurrer.

There are many other cases to the same effect. Admittedly, none of the decisions cited—and they have all been examined—presents identically the same phraseology as we find in the complaint before us. But a fair consideration of the authorities, keeping in view that "the court must," as provided in section 475, Code of Civil Procedure, "in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties," leads to the conclusion that the complaint is not so defective as to be insufficient to support the judgment. In view of the technical nature of the objections urged and the manifest justice of the determination of the cause reached by the trial judge, if deemed necessary to support the judgment, any appellate court should and could hold, without doing violence to any rule of pleading or principle of equity, that as against a general demurrer, there was either a sufficient attempt to allege the orders of the probate court, or that if the form of pleading adopted in that behalf constitutes simply a legal conclusion and such legal conclusion must be disregarded, then the defect is supplied by the averment of the ultimate fact that plaintiff is the owner and holder of the note in controversy. Any other view, it seems to us, would be a reproach to the law and almost a wanton infraction of the principles of equity.

To understand the significance of the other objection, the following facts must be observed: The complaint contains the usual allegation that certain defendants, including the appel-

lants, claim some right or interest in the property, but that it is subsequent and subordinate to plaintiff's lien. Appellants answered this allegation as follows: "Defendants admit that they have and claim, and that each of them has and claims, an interest in certain portions of the property described in the said complaint, but deny that their said interest, or that the interest of any of them, is subsequent or is subordinate or is subject to the lien of the said mortgage." The allegation of the indorsement and delivery of the promissory note contained in the complaint was denied in said answer as follows: "Defendants deny that on or about February 1st, 1894, or at any other time, or at all, Jane L. Stanford indorsed and delivered or indorsed or delivered to the said plaintiff the said fourth promissory note, described and set forth in paragraph 15 of the said complaint, and that the said plaintiff ever since has been and now is the owner and holder or owner or holder of said note." The answer further denies "that there is any sum or amount whatever now due, unpaid or owing upon the said promissory note."

By reason of the foregoing allegations and denials appellants claimed the right at the trial to introduce evidence of a novation, or, as it appears in the bill of exceptions: "That while plaintiff was putting in its case the defendants hereinafter named repeatedly endeavored upon cross-examination to introduce in evidence the agreement set out in the proposed amended answer hereinafter contained, but objection being made by plaintiff *on the ground that said matter was not cross-examination, the same was ruled out*. That after the close of plaintiff's case, said defendants hereinafter named proceeded to and did offer in evidence, without any objection, their respective chains of title and claims to, in or upon the property involved in this action." Thereupon said defendants offered in evidence the agreement set out in said proposed amended answer, which was offered, so counsel stated, "for the purpose of showing that said note had been supplemented, changed and modified and that the same is no longer a valid or existing obligation of any kind or character, that being a new and different agreement substituted in this suit." In response to a question by the court, counsel for appellants stated that the paper in question constituted an agreement of the parties in interest whereby the amount due is \$121,000, instead of \$112,500, as provided in the note upon which the suit was

brought, and that it was to bear a greater rate of interest and that the amount due was to be paid in two installments instead of one, etc. In other words, the instrument is one which shows a complete novation as to this promissory note. "First, as to the change in the amount of the note, and, second, as to the times of payment, and the payments, and the rate of interest which it shall bear, and as to the terms upon which this mortgage shall be released, and providing that the mortgage, as modified, shall stand as security for the new amount, and in the event of foreclosure interest shall be given at the rate indicated." Upon objection being made upon the ground that it was not addressed to any issue in the case, the court declined to admit the evidence, holding that it was not admissible under the pleadings, and should be specially pleaded. Subsequently appellants asked leave to file an amended answer setting up this agreement and alleging in appropriate phraseology that it was executed as a novation and also setting up the bar of the statute of limitations against the enforcement of this new obligation. The court sustained plaintiff's objections.

Appellant Henshaw then made application to file an amended answer setting out the same agreement as a novation and alleging that by virtue of the novation his own mortgage became a first lien upon the premises, and that any claim, lien or demand of the plaintiff was subsequent and subordinate thereto, and also "that on the 14th day of January, 1896, the defendant duly commenced an action in the Superior Court of the City and County of San Francisco against the plaintiff above named, and against the defendants, James P. McCarthy and William Fitzhugh, and others, for the purpose of foreclosing his aforesaid mortgage; that said action is still pending and undetermined." In support of the opposition to the application, counsel for plaintiff stated: "This is the first time that this instrument has been brought into this action. The answer of these defendants was filed on the 2d day of April, 1899. This action was begun on the 4th day of January, 1898. Their answer was filed more than four years ago. In the meantime, if there has been a novation of this original obligation by reason of the execution of this agreement, any cause of action stated in this amendment on that new obligation has become barred by the statute of limitations." Besides, it was contended that it was unconscionable on their part—never having apprised the plaintiff of it—to set up a

defense which would deprive plaintiff of its cause of action. The court, in sustaining the objection, stated: "Mr. Henshaw is not in privity with this contract, or with any of the parties to the contract. Whatever rights he acquired were acquired before this was executed. If a suit was brought upon this agreement and he was made a party, and he alleged that he had a mortgage prior to the making of the agreement, he would plead himself out of court. If the defense were allowed it would have the effect of making his mortgage previous to the plaintiff's, and it would defeat the rights of all of the defendants. Now, here is a party who has known of this agreement and has not pleaded it, and now to ask to plead it would have the effect of giving him a prior lien, and I think it would be an inequitable thing to do." It would seem that any judge would take the same view of it. It is true, as contended by counsel, that courts should be liberal in allowing amendments for the purpose of aiding and facilitating the trial of causes upon their merits. Ordinarily, an application to amend a pleading to present more fully or accurately a cause of action or a defense should be granted upon such terms as shall appear just. In *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 396, it is said: "An amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purpose of justice." (See, also, *Guidery v. Green*, 95 Cal. 630, [30 Pac. 786]; *Crosby v. Clark*, 132 Cal. 1, [63 Pac. 1022]; *McDougald v. Hulet*, 132 Cal. 155, [64 Pac. 278]; *Marr v. Rhodes*, 131 Cal. 267, [63 Pac. 364]; *Carters v. Lothian*, 133 Cal. 451, [65 Pac. 962].)

But it is clearly established by the authorities that the appellate court will not reverse an order denying leave to amend except for abuse of discretion. As said in *San Joaquin Valley Bank v. Dodge*, 125 Cal. 84, [57 Pac. 687]: "Amendments to pleadings are left much to the discretion of the court below, and it is presumed that such discretion will always be exercised in furtherance of justice and with the end in view of disposing of cases upon their merits. We cannot interfere except in cases where such discretion is abused."

Such amendments, as well observed, are allowed in the interests of justice and not simply to give the party a technical advantage. (Code Civ. Proc., sec. 473.)

In *Cooke v. Spears*, 2 Cal. 412, [56 Am. Dec. 348], in discussing the refusal of the court below to allow an amendment

to set up the bar of the statute of limitations, it is said: "If the statute of limitations had been pleaded in the first instance, there would have been no ground to have objected to it, and the court would have had no legal discretion to have ordered it to be stricken out. But having been omitted when the application to amend was made, the first question certainly presented was, Will it be in furtherance of justice? Such is the language of the statute; such clearly was the intent of the law. But we take it that the judge below was not bound to allow the amendment, unless it would further the ends of justice. He refused it, doubtless believing the contrary, and we think he did right."

In *Page v. Williams*, 54 Cal. 563, the defendant in an action upon certain promissory notes, after the plaintiff had rested his case and the defendant had given some evidence, offered to show that the notes were given without consideration; and upon the court refusing to hear such proof under the pleadings, defendant asked leave to file an amended answer alleging want of consideration. The court refused to permit it on the ground that the case had been at issue nearly two years, and the trial had already commenced and new issues would be tendered by the amendment. The supreme court said: "In our opinion, the court properly exercised its discretion in refusing to allow this amendment." (See, also, *Harding v. Minear*, 54 Cal. 502; *Bank of Woodland v. Heron*, 122 Cal. 108, [54 Pac. 537].)

In the case at bar the effect of allowing the amendment, if supported by the evidence, would have been to defeat plaintiff's claim, and the court was justified in treating it as an application to amend in order to plead the statute of limitations.

Appellants contend that "the idea of administering rules of pleading with a view of reaching an end different from that attained by the substantive law and thus working out an indefinable justice, is illogical and absurd." But the vice of the statement is in the implication that the degree and quality of justice are determined by the method adopted in its pursuit.

That there is a difference between legal and equitable rights and that a distinction is properly made between purely statutory and moral considerations in the enforcement of obligations and in the application of remedies, no one will probably

deny. If no such distinction exists the judges will have to recant many errors and our whole judicial system will need reconstruction.

Appellants invite us to a discussion of the phrase "furtherance of justice." Obviously it is "such justice as the law administers when correctly applied." (*Stringer v. Davis*, 30 Cal. 322.) But that description does not and cannot prescribe what proceeding shall be taken by a trial court in every case where an amendment of a pleading is sought. In fact, the term undefined is probably defined the best as "beauty unadorned is adorned the most." Each particular case must be left to the wise discretion and enlightened conscience of the chancellor.

Appellants seem to think that it is "in furtherance of justice" to promote their interest at whatever cost to someone else. They have apparently forgotten the qualification of the rule that amendments should be allowed in furtherance of justice when it can be *done without prejudice to the substantial rights of others*. Assuredly, after an action had been pending for five years, it was no abuse of discretion to refuse to allow an amendment and thereby preserve to plaintiff the right to enforce a just obligation to the amount of nearly \$200,000, and to subject to the prior claim of plaintiff a mortgage executed subsequently, when the effect of granting the amendment might be to defeat plaintiff's claim altogether, and to give appellants an advantage which the evidence does not show they needed. The ability and industry of counsel for appellants compel admiration, but to uphold their contention, in our opinion, would be a travesty of justice rather than in furtherance thereof.

The judgment and order denying the motion for a new trial are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 31, 1907.

[Civ. No. 244. Third Appellate District.—April 3, 1907.]

D. A. MANUEL, Respondent, v. P. A. FLYNN, Appellant.

ACTION TO QUIET TITLE TO STRIP OF LAND—BOUNDARY—SUPPORT OF FINDINGS AND JUDGMENT.—In an action to quiet title to a strip of land involving a disputed boundary line between the parties, where the evidence is conflicting in relation thereto, and there is evidence fully sustaining all of the material findings in favor of the plaintiff, which are amply sufficient to support the judgment, the province of the trial court to pass upon the weight of the evidence cannot be interfered with upon appeal.

ID.—TESTIMONY OF PLAINTIFF TO PARTICULAR SURVEY—CROSS-EXAMINATION AS TO OTHER SURVEYS.—Where plaintiff testified in chief only as to the employment of a particular survey or to establish the boundary line and to his own observation as to the meeting of corners, the court properly disallowed questions asked on cross-examination as to other surveys not referred to in the examination in chief.

ID.—LATITUDE OF CROSS-EXAMINATION—SCOPE LIMITED BY EXAMINATION IN CHIEF.—The right of cross-examination should be given considerable latitude or not be restricted where it is apparent that it will accomplish some important purpose, and is not carried beyond the scope of the examination in chief. The discretion of the court should not be abused, or given such elasticity as to permit an adversary party to prove his own case under the guise of cross-examination by propounding questions, neither directly nor collaterally related to the subject matter of the original examination. When cross-examination transcends the limitation and purpose of the testimony in chief, it ceases to be cross-examination.

ID.—WRITTEN AGREEMENT AS TO LOCATION OF CORNER—ALTERATIONS—BURDEN OF PROOF—IMMATERIALITY.—Where the plaintiff introduced in evidence a written agreement as to the location of an important corner in which alterations appear, the burden of proof was upon the plaintiff to explain the same, and where one was shown to have been made before signing, and the other to have been made merely to correct a manifest mistake in a figure relating to the location of a tree, the location of which was definitely fixed in the agreement by descriptive reference to other monuments, the alterations were sufficiently explained, and shown to be immaterial.

ID.—TIME FOR DISPROOF OF EXPLANATION.—The proper time for an attempt by the defendant to disprove the explanations offered by the plaintiff to show the immateriality of the erasures in the written agreement was when those explanations were made, and when the admissibility of the written agreement was before the court for

its determination, and the court's conclusion on that issue is binding here, notwithstanding a subsequent attempt of defendant to disprove the explanation, when it cannot be said, as matter of law, that the court's determination was unsupported by the explanations made.

ID.—EVIDENCE—DECLARATION AGAINST INTEREST.—A witness for the plaintiff was properly allowed to testify to a conversation with the defendant at the time when plaintiff's fence on the boundary line was intact, in which the defendant stated that he had all the land that belonged to him. The evidence, while not conclusive, was admissible to show a declaration by the defendant against his interest.

ID.—DOCUMENTARY EVIDENCE—NOTICE TO REMOVE FENCE SERVED BY CONSTABLE—CERTIFICATE NOT PRIMA FACIE EVIDENCE.—Where plaintiff denied having received any notice to remove his fence, a notice signed by the defendant and certified by the constable to have been served by him upon plaintiff was not admissible, the certificate being no part of the official duty of the constable, and not *prima facie* evidence of the fact of service.

ID.—NEW TRIAL—AFFIDAVITS—BILL OF EXCEPTIONS—REVIEW UPON APPEAL—STIPULATION.—Affidavits used on a motion for a new trial cannot be considered on appeal from an order denying the motion, where they are not incorporated in a bill of exceptions authenticated as required by rule XXIX of this court, and a stipulation of attorneys to the correctness of the transcript cannot take the place of such authentication, whether it includes the affidavits or not, especially where it does not thereby or otherwise appear that they constituted all the affidavits and papers used on the hearing.

APPEAL from a judgment of the Superior Court of Napa County, and from an order denying a new trial. A. G. Burnett, Judge presiding.

The facts are stated in the opinion of the court.

Webber & Rutherford, for Appellant.

T. B. Hutchison, for Respondent.

HART, J.—Action to quiet title and for damages claimed to have been suffered by plaintiff through certain alleged tortious acts of defendant.

The complaint alleges that the plaintiff, "ever since the 23d day of February, 1884, has been the owner, in possession

of and entitled to the possession of certain real property, situate within the County of Napa, State of California," and of which a description is particularly set out. The title in plaintiff to the land as described in the complaint is not questioned, but the controversy arises over the line dividing the lands of the parties and involves a certain strip of land which the plaintiff claims is within the description of the property belonging to him, but which defendant insists is within the boundaries of his lands.

It is also charged, by appropriate averments, that on the ninth day of May, 1901, the defendant committed a trespass, *vi et armis*, upon said property of plaintiff, and that on the fourteenth day of May, 1901, he likewise entered upon the property in dispute, and "maliciously tore down and destroyed the fence belonging to said plaintiff along the north and east sides of said plaintiff's land for a distance of about one mile." It is charged that by reason of the trespass first alleged, the plaintiff suffered damage in the sum of \$2,000, and that because of the alleged destruction of the fence he was damaged in the sum of \$100. Other damages are alleged to have been sustained in the sum of \$100 and \$200, respectively, for cutting down and destroying trees on plaintiff's property and by reason of the alleged fact that through the destruction of the fence the stock of plaintiff was enabled to and did run at large, etc. It is alleged that defendant claims some interest in plaintiff's property adversely to the latter. The complaint is unverified.

The answer denies the allegations of the complaint, both as to plaintiff's ownership of the certain strip or portion of the land referred to and as to the damages claimed. The question presented by the pleadings, aside from the incidental question of damages, is as to the ownership of said strip of land, approximately two chains in width and something like a half mile long.

The plaintiff was given judgment, quieting his title to the strip of land in controversy and awarding him damages in the sum of \$200—\$100 for the destruction of the fence as alleged, and \$100 for the alleged injury suffered by plaintiff through the running at large of plaintiff's stock, in consequence of the alleged destruction of the fence and the loss thereby to him of the value of the pasturage upon said lands. The last-mentioned item of damages was, however, upon the order

of the court at the time the motion for a new trial was made, remitted by the plaintiff, and the judgment, so far as it affected damages, was reduced accordingly. The conclusion of the court was, as the findings of fact and judgment show, that the plaintiff's contention as to the location of the line between the lands of the parties was sustained by the evidence. The appeal is from the judgment and order denying a new trial.

1. Appellant contends that the evidence is insufficient to support the findings of the court, and specifies the particulars in which the evidence, according to his view, sustains his position. There appears from the record some conflict in the evidence relative to the disputed line dividing the respective properties of the parties. There is seldom presented to the appellate court a record on appeal of which the same thing may not be said where the sufficiency of the proof of the ultimate fact is challenged. But we think the evidence as shown here fully sustains all the material findings, from which the judgment derives ample support to uphold it.

While it could serve no useful purpose to consider the evidence in detail, in view of our opinion as already expressed that it fully justifies the findings of the court upon all the essential propositions in the case, it may be well to explain the exact point of difference between the parties and make a brief statement of the facts bearing upon that point as established by the evidence. The lands of the appellant are situated without the exterior boundaries of the grant known as the "Rancho Carne Humana," near Calistoga, Napa county, while the lands of the respondent are located within the boundaries thereof. In the determination of the ultimate fact it became necessary to locate through the evidence the eastern boundary line of said ranch as made by certain early surveys. The respondent contends, of course, that the strip of land in dispute is embraced within the boundary line of said rancho, while the appellant claims that it is not, and the whole controversy finally hinges upon and is reduced to the determination of the location of what is known as "Corner 51." This corner was thus designated by one Tracy, a surveyor, who surveyed the rancho in the early sixties, and was thereafter designated as "Corner 32" by one T. J. De-woody, a surveyor, who, in the month of February, 1867, and in the month of August, 1868, surveyed the rancho, and

which survey so made by him was subsequently confirmed by the United States district court, and contains a full description of the boundary lines of said rancho. In the year 1886 and again in the year 1887, one O. H. Buckman, a surveyor and civil engineer, surveyed, at the request of the plaintiff, a portion of the land of the latter for the purpose of ascertaining the location of the line, and at the trial testified that he "ran the north line of Lot 5, a part of the line of the Rancho Carne Humana, and some of the lines of the government surveys adjoining. One of the corners of the rancho is on the line of Mr. Manuel, commonly called Corner 51 of the Tracy survey." He said that he was familiar with the field-notes of the "Tracy survey of the Carne Humana Rancho as affecting Corner 51, and also with the field-notes of the Dewoody survey" of said rancho, and that, according to the field-notes of those surveys there was no change made in the Dewoody survey and corners 50 and 51. There was other evidence to this point. The plaintiff testified that he built a fence on the line made by Buckman a short time after the latter made his survey, and that the same remained on that line until destroyed by defendant a short time prior to the institution of this suit. There were other witnesses who corroborated the testimony thus given on behalf of plaintiff. There was also admitted in evidence a written agreement, made in February, 1884, and to which the plaintiff and defendant, and Ephraim and T. A. Light (the latter owning lands adjoining those of the former) were parties, which stipulated as to the correct location of "Corner 51." There is some testimony directly tending to show that the line as contended for by plaintiff was consistent with the number of acres embraced within his lands, as described by metes and bounds—that is to say, that, including the strip of land in dispute in the computation of the number of acres embraced within the description of the lands belonging to plaintiff, the latter would only have the number of acres to which he was entitled. On behalf of defendant there was evidence contradictory of that given for plaintiff. Wallace, a civil engineer, testified to having made a survey of the disputed line of the rancho a short time previous to the trial of this action. His testimony, as well as that of one Lillie, who stated that he was then engaged in the business of a carpenter but had studied and had had some experience in

surveying, was, as to the location of the grant line and "Corner 51," opposed to that given for plaintiff. There was also testimony given by neighbors and old settlers in the locality of the lands of the parties tending to corroborate the testimony of the surveyors thus testifying for the defendant. The evidence, so far as such a proposition may be determined from the bare record, seems to greatly preponderate in favor of the plaintiff's contention. It was, however, as is well understood, for the court below to pass upon the weight and probative force of the evidence, and, having done so, and made its findings accordingly upon evidence sufficient to justify them, its conclusions are beyond our power to disturb.

2. The appellant complains of a large number of alleged errors in the rulings of the court on the admission and rejection of testimony. There are only a few of these which we think justify special notice. The plaintiff testified to having employed surveyor Buckman to run some lines for him for the purpose of ascertaining the proper line of division between his lands and those of the defendant. The witness stated that he was present when Buckman made the survey, and confined his testimony to the fact of the employment of Buckman and what the latter had done in the matter of marking the corners, etc., as established by said survey. Upon cross-examination the witness was asked if Buckman was "the only surveyor who surveyed that land for you, and who ran the lines you have testified to?" An objection that the question was not cross-examination was sustained. The witness had not been questioned on his examination-in-chief as to any other survey having been made at his request than the one concerning which he testified. We can understand how such a question, if its purpose is the impeachment of the witness, or laying the foundation therefor, might be proper on cross-examination; but the question here was not in form to imply any such purpose. If the defendant deemed it important to show that the witness had caused other surveys to be made than the one to which he testified in chief he was not at liberty to do so by making the plaintiff his own witness before the latter had closed his case. He could have called him for that purpose, had he desired to do so, upon the presentation of his defense. Counsel declares that a more pertinent question could not have been asked in cross-examination of the witness in view of his direct testimony.

It is true that the right of cross-examination should be given considerable latitude or not be restricted where it is apparent that it will accomplish some important purpose and is not carried beyond the scope of the examination-in-chief. The power of cross-examination is one of the most efficacious weapons with which truth may be pursued and discovered. The law, it must be admitted, has contrived no other method or test so productive of that result. Trial courts, therefore, in the exercise of the discretion committed to them as to the extent of the cross-examination, should, for the sake of the discovery of the truth of a disputed fact, give it full range for that purpose, and yet the discretion of which we speak should never be abused, or given such elasticity as to permit an adversary party to prove his own case under the guise of cross-examination, by thus propounding questions which are neither directly nor collaterally related to the subject matter of the original examination. The truth sought by a cross-examination must, of course, be in respect of and limited to the material matters to which the witness has testified in chief, and when such examination transcends that limitation and purpose, it ceases to be cross-examination. It does not appear what defendant's purpose was in asking the question, but whatever its purpose, the form in which it was put rendered it, in our opinion, not pertinent cross-examination, and the court's ruling thereon was not erroneous.

3. The written agreement to which we have referred as having been entered into by and between the plaintiff, the defendant and the Lights, and which was received in evidence, was objected to by appellant because it had been altered in some respects. The instrument upon its face presented evidence of having been at some time altered after it was written. This objection having been made, the burden was upon plaintiff to explain or account for such alterations, if they involved a part thereof material to the question in dispute. (Code Civ. Proc., sec. 1982.) The plaintiff was, therefore, questioned as to the alterations, and testified that the name "Dewody" had been inadvertently and unnecessarily written in the agreement twice, and that the erasure of the name in one place was made before the agreement was signed. Plaintiff also testified, and likewise his son, William A. Manuel, that after the agreement was signed he observed that the first figure of the number "11," inserted in said

agreement as indicative of the dimensions of one of the "witness trees," had been written in such manner as to give it the appearance of a figure "4," which would have made the number read "41" instead of "11." The son of plaintiff, upon discovering the apparent mistake, changed the figure so that it conformed, as he declared, to what it was intended to be and what was understood to be the dimensions of the tree by the parties when the agreement was executed. The location of the tree was definitely fixed in the agreement by descriptive reference to other monuments and its distance therefrom, and was marked "B. T." by the parties, so that, whatever might have been its dimensions, it was thus clearly capable of identification as the "witness tree" to which the parties had reference when making the agreement. This erasure was, therefore, in our opinion, immaterial. The other erasure was, as observed, shown to have been made previous to the signing of the agreement and in any event immaterial. No attempt was made by the defendant to contradict the explanation of the erasures by plaintiff until the defendant took the stand in his own behalf. He said that all the erasures were made subsequent to the signing of the instrument. But the proper time for him to have offered this testimony upon the point was when the question of the admissibility of the document was before the court for determination. And even so, the court's conclusion from the evidence upon that issue would be binding here, unless, of course, it appeared that it was admitted by the plaintiff that he had without the consent of the other parties altered the agreement in some part material to the question in controversy subsequent to the execution of the instrument, or the evidence accounting for material alterations was such as to enable us to say that, as a question of law, it would not support the conclusion of the court.

4. The witness Doda was permitted, over an objection by defendant, to state that during a conversation with appellant the latter, at a time when the fence built by respondent was still intact, said that he (appellant) had all the land that belonged to him. The deduction from this statement by appellant was that the fence constructed by respondent was, under appellant's belief, then on the correct dividing line of the lands of the parties. The evidence while, of course, furnishing only a circumstance and is not conclusive upon the

point to which it related, was undoubtedly admissible as a declaration against the interest of the defendant. (Code Civ. Proc., sec. 1870, subd. 2.)

5. Nor was error committed in the refusal of the court to admit in evidence a paper purporting to be a notice served on the plaintiff by the defendant through one Scott, then a constable, commanding the respondent to restore a fence, charged to have been removed by him, to "its proper place." The notice was signed by the defendant and a certificate attached to it by Scott, setting forth that the same had been served by him on the plaintiff. The testimony disclosed the fact that Scott had died previously to the time of the trial. If the notice was proper testimony for any purpose, the document was nevertheless inadmissible. The service of the notice was not an act within the constable's official duties under the law, and his purported certificate was not even *prima facie* evidence of the fact of service. This document was shown to the plaintiff when he was on the witness-stand and he denied that he had ever been served by anyone with such a notice. It was then that it was offered in evidence by counsel for appellant. The court's ruling excluding the alleged notice was proper.

6. There appears in the transcript certain affidavits of defendant, his son, Thomas Flynn, and Rollo Fay, deputy recorder of Napa county, which affidavits, it is claimed in the briefs of appellant, were used on the hearing of the motion for a new trial. The affidavit of defendant is to the effect that he was surprised at the testimony given for the plaintiff of some of the witnesses; that he did not anticipate such testimony and was, therefore, unprepared to meet it at the trial, and alleged that if a new trial were granted he could produce evidence to contradict it, etc. The other affidavits set forth facts in opposition to those testified to by said witnesses which affiants deposed that they would give in evidence upon another trial of the cause. These affidavits are not incorporated in a bill of exceptions, but counsel claim that they can nevertheless be considered on this appeal, because of a stipulation entered into between the attorneys representing both parties, to the effect "that the foregoing printed pages shall constitute the Transcript on Appeal in the above-entitled cause, and that the appeals may be heard thereon," and "that the papers therein mentioned are cor-

rect copies of the originals on file in the Superior Court of Napa County, with the endorsements of the dates of filing the same," etc. Said stipulation appears in the transcript but not in the statement or in a bill of exceptions, and is signed by the attorneys for appellant and the attorney who tried the case for respondent and who has died since the taking of the appeal. (The present attorneys for respondent were thereafter substituted for and in the place of the deceased lawyer.) It is not clear that the stipulation includes the affidavits mentioned. But whether it does or not, we think that under the rule of this court and the decisions, the affidavits, not being incorporated in a bill of exceptions and therefore not authenticated as required by rule XXIX of this court, cannot be considered on this appeal.

In *Melde v. Reynolds*, 120 Cal. 237, [52 Pac. 491], there appeared in the transcript certain affidavits upon which was indorsed the following: "Affidavits of . . . used on hearing of the motion for a new trial. John Hunt, Judge." These affidavits were not incorporated in a bill of exceptions and authenticated as required by rule XXIX of the court, and it was held that they could not for that reason be considered on appeal. The court says: "When a motion for a new trial is made upon the ground of accident or surprise, it must be made upon affidavits (Code Civ. Proc., sec. 658); but whether an affidavit was 'used on the hearing' can be determined only by the judge before whom the hearing was had, and as there is no other mode provided by law for authenticating the affidavits which may be used on the hearing of the motion, under Rule XXIX, they cannot be considered on the appeal unless they are incorporated into a bill of exceptions. (Citing *Herrlich v. McDonald*, 80 Cal. 472, [22 Pac. 299]; *Van Glahn v. Brennan*, 81 Cal. 261, [22 Pac. 596]; *Spreckels v. Spreckels*, 114 Cal. 60, [45 Pac. 1022]. See, also, *Skinner v. Horn*, 144 Cal. 279, [77 Pac. 904].) A bill of exceptions, settled as directed by section 651 of the Code of Civil Procedure, would contain all the affidavits upon which the judge acted in making the order, but the indorsement by him upon certain affidavits that they were used at the hearing of the motion does not make them the record of the papers upon which the motion was heard, since it does not appear thereby that these were all the papers used at the hearing." (Citing *Shain v. Eikerenkotter*, 88

Cal. 13, [25 Pac. 966]. See, also, *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, [70 Pac. 299], et seq.) In that case, it is to be noticed, even the indorsement upon the affidavits by the judge who heard the motion that they had been used on the hearing, they not having been incorporated in a bill of exceptions, is held to be insufficient to meet the requirements of the rule. Certainly, where, as here, there is nothing more than the mere stipulation of the attorneys showing that they had been so used could not authorize their consideration upon appeal. Moreover, it does not thereby or otherwise appear that they constituted all the affidavits and papers used on the hearing.

We find no error in the record prejudicial to the defendant.

Judgment and order are affirmed.

Burnett, J., and Chipman, P. J., concurred.

[Crim. No. 51. Second Appellate District.—April 3, 1907.]

THE PEOPLE, Respondent, v. JOHN WHITE, Appellant.

CRIMINAL LAW—ROBBERY—SUPPORT OF VERDICT—CONFLICTING EVIDENCE—FORCE AND FEAR.—Upon a prosecution for robbery, where the evidence is conflicting as to the identity of the defendant, the jury are the sole judges of the credibility of the witnesses and the weight of the conflicting evidence; and where the complainant's description of the occurrence up to the time of the delivery of her purse to her assailant shows that it was delivered through force and fear, the taking involved the crime of larceny, but embodies every element of the crime of robbery.

Id.—MOTIVE—ROBBERY AND RAPE—INSTRUCTION—PRESUMPTION.—Where the evidence indicates a motive and intent to commit both robbery and rape, and the court instructed the jury that if the assault was for the purpose of rape, and if there was no intent to rob, and no taking of the purse by force or fear, the defendant should be acquitted, it must be presumed that the jury did its duty in heeding the instruction.

Id.—QUESTIONS OF FACT—CONCLUSIVE DETERMINATION.—The credibility of the complaining witness and the preponderance of the evidence, and also what intent and motive were established by the evidence

were questions of fact, which were conclusively determined by the superior court in denying the motion for a new trial, and cannot be considered by the appellate court.

ID.—INSTRUCTIONS NOT CONFLICTING AS TO INTENT AND MOTIVE.—The instruction dealing with the hypothesis of intent to commit rape without intent to rob did not conflict with another instruction dealing with the hypothesis of robbery, notwithstanding an assault may have been made for some other purpose or motive.

ID.—INAPPLICABLE REQUESTS.—Instructions given to the jury must always be adapted to the evidence and circumstances of the case on trial, and requests for instructions by the defendant which were inapplicable thereto were properly refused.

ID.—IMPROPER REMARK BY DISTRICT ATTORNEY—STATEMENT OUTSIDE OF RECORD—QUESTION NOT PRESENTED TO TRIAL COURT.—An improper remark by the district attorney as to matter outside of the record is not ground of reversal, where the attention of the court was not called to the matter at the time, and no opportunity was given to the trial court to correct the abuse, where the effect of the remark could have been removed by an instruction to the jury to disregard it.

ID.—FAILURE TO REQUEST INSTRUCTIONS.—The failure of the court to instruct the jury upon any proposition deemed essential by the defendant is not to be regarded as error unless the defendant made a request for said instruction.

ID.—CRIMINAL PROPOSAL BY DEFENDANT TO PROSECUTRIX—WRITTEN STATEMENT—RIGHT OF CROSS-EXAMINATION NOT INVADED.—The fact that the prosecutrix was allowed to give a written rather than an oral statement of a criminal proposal made to her by the defendant at the time of the assault was not an invasion of the right of cross-examination.

ID.—DOUBLE VIEW OF PREMISES—ABSENCE OF JUDGE—WAIVER OF OBJECTION.—The absence of the judge from a first view by the jury of the premises where the alleged robbery was committed was erroneous, but where the jury was properly instructed and there was no timely objection to his absence, and where the judge fully instructed the jury to disregard all impressions received upon the first view, and another view was taken in the presence of the judge without objection, there was no ground for granting a new trial by reason of the absence of the judge during the first view.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

H. H. Appel, and F. R. Robertson, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

TAGGART, J.—Defendant was informed against for the crime of robbery. From a judgment of conviction in the superior court, and an order of that court denying his motion for a new trial, he appealed to the supreme court. This appeal was regularly transferred to this court for hearing and decision.

The evidence of the commission of the crime rests almost entirely upon the testimony of the complaining witness. The defense relies upon an alibi and the insufficiency of the identification of the defendant.

As the complaining witness was returning to her home about half-past 10 o'clock on the night of June 18, 1902, a man stepped in front of her. She stopped, threw up her hands and he struck her with a rock. She screamed, he told her to "shut up," put his arm around her neck and struck her in the mouth with his fist. She kept screaming and he kept "beating" her. They both fell down, he on his knees and she on her back on the sidewalk. He kept pounding her in the face and she begged him to let her up. At last he "loosened up a little" on her and she said, "Do you want my money?" and he said, "Where is it?" She said, "It's in my pocket." He said, "Give it to me." . . . He kept saying, "Give it to me." "So," says the witness, "I twisted myself in shape that I got the pocketbook, and he took it."

After another effort to scream, followed by further beating, the man made a proposal to her which she characterized as the "worst proposal a man can make to a woman." This statement was stricken out on motion of defendant. The witness then further testified that she was dragged through an opening in a billboard to a sandbank near the river, an effort was made by her assailant to tear her clothing from her, the undoing of his own clothing by the man, and other preparations made by him tending to show an attempt to commit rape. The witness described the face and dress of the man with much particularity of detail and attributed her ability to do this to the location of certain lights and to the fact that while she had been held down on the ground, an elec-

tric headlight on a passing street-car had shone upon the man's face and clothing in such a manner as to enable her to see him with great distinctness.

The "proposal" spoken of was not introduced upon the direct examination of the witness. Defendant demanded that the prosecution be required to disclose the language of this proposal as part of the transaction, and excepted to the refusal of the court to require this to be done. On cross-examination the witness requested to be relieved from using the language of the proposal, and was permitted, with consent of defendant's attorney, to write it on a piece of paper. It was a solicitation of sexual intercourse. It does not clearly appear from the record how or when (if at all) this language was disclosed to the jury. The suggestion was made by the district attorney that the writing be submitted to counsel and jury, but it does not affirmatively appear that this was done.

It is urged that the verdict is contrary to the evidence because, among other things, the condition of the lights at the scene of the crime were such that it was improbable that the complaining witness could have seen her assailant with sufficient clearness to be able to identify him. Beside the cross-examination of the complainant in this regard, the record shows many pages of testimony disclosing the results of various experiments made by different persons at the place where the offense was consummated to test the effect of the lights mentioned in complainant's testimony. The testimony introduced by the defendant tended to establish a condition of darkness, and that of the prosecution one of light. The jury resolved these contradictory opinions in favor of the truthfulness of complainant's story, and they were the sole judges of the credibility of the witnesses and of the weight of such conflicting evidence.

It is also contended that the motive and intent shown by the evidence indicated rape rather than robbery, that no *taking* was proven and, conceding a larceny was established, that it was not accompanied by sufficient force to constitute robbery. The complainant's description of the occurrence up to the time of the delivery of her purse to her assailant embodies every element of the crime of robbery. Force and fear were both present, and it is unnecessary to distinguish those cases discussing the violence of the force used.

Motive and intent to commit both robbery and rape appear from the evidence. In order that evidence of the latter might not induce the jury to find the defendant guilty of the former, merely because robbery was the crime charged in the information, the court gave the instruction marked "XXX." The jury were thereby informed that, if the assault was for the purpose of rape and there was no intent to rob, and no taking of the purse by either force or fear, the defendant should be acquitted. It must be presumed that the jury did its duty and obeyed this instruction of the court.

The questions of the credibility of the complaining witness and the preponderance of the evidence, so extensively presented by appellant in his brief, were ultimately and conclusively determined by the superior court when it denied his motion for a new trial, and cannot be considered by this court. What intent and motive were established by the evidence were also questions of fact and were included in that determination.

The effect of instruction XXX as to intent with which the crime was committed was not neutralized by the giving of the last instruction (not numbered) by the court. The latter instruction is in the following language:

"The court instructs the jury that, if you believe from the evidence, beyond a reasonable doubt, that the personal property mentioned in the information was in the possession of the witness Kate A. Dripps, and that the defendant by the use of force and violence upon the person of said Kate A. Dripps, or by putting her in fear, compelled her, against her will, to deliver to him the said personal property, or any part thereof, mentioned in the information, from her person, or immediate presence, as charged in the information, and that defendant then and there took and received said personal property from said Kate A. Dripps, under such circumstances and by such means, then the defendant would be guilty of robbery, even though you may further believe from the evidence that the defendant may have attacked the said Kate A. Dripps (if you believe from the evidence that he did attack her) for some other purpose or motive."

If, as contended by appellant, the jury were advised by this instruction that a felonious intent to take the personal property mentioned in the information was not necessary to constitute the crime of robbery, then it would have been

an erroneous statement of the law, but we do not think this a necessary or proper construction of the language used by the court. The moving intent was evidenced by the acts of the party and the presumption of law that he intended the ordinary consequences of his acts. (Pen. Code, sec. 20; Code Civ. Proc., secs. 1962, 1963.) This attached successively to each act as done regardless of the original intent.

The last instruction given is not in conflict with instruction XXX. By the latter instruction (XXX) the jury were told that if the assault was not made "for the purpose of committing the crime of robbery, and that the person who assaulted Mrs. Dripps did not intend to rob her," and did no act in connection with the assault from which an intent to commit the crime of robbery could be inferred, then they should acquit the defendant. One instruction deals with an hypothesis in which no element of robbery was present at any time in the transaction. The other with a transaction in which the *original* attack was made with the intent to do something else, but the later acts in which justified the inference of an intent to commit the crime of robbery.

Appellant contends that the court should have instructed the jury in regard to three matters upon its own motion, to wit: The effect of evidence tending to show intoxication in respect to the motive or intent with which an act was done; the definition of the word "fear" as given by section 212 of the Penal Code; and the definition of the word "robbery" as distinguished from grand larceny; and the failure to do so is assigned as error. A consideration of the last proposition includes the same question of law arising from the failure of the trial court to give an instruction as to the "lesser offenses" included in the crime of robbery (instruction XIV), at the request of the appellant.

Instructions given to the jury must always be adapted to the evidence and circumstances of the case on trial. The whole defense rested upon the theory that defendant was perfectly sober. He staked his case upon the fact that he was not there. So there is nothing in his case to justify an instruction upon the question of intoxication. The case for the prosecution did not rest upon the intoxication of the defendant to establish motive. It did not rely upon fear alone to show a robbery, but force and fear combined. There was no element of stealth in the taking proven, and nothing in

the evidence to require the court of its own motion to distinguish robbery and grand larceny. This case is one of the class in the mind of the court, when the opinion in the case of *People v. Church*, 116 Cal. 303, [48 Pac. 125], was written, and the following language used: "Many cases of robbery may be disclosed by the evidence where the trial court would be justified in refusing an instruction to the effect that the defendant could be convicted of grand larceny. Such cases would be those where the evidence, without contradiction, indicates the offense to have been accomplished by means of force or fear."

The statutory definition of the crime of robbery was given to the jury in one of the instructions of the court. That was sufficient. The failure of the trial court to instruct the jury upon any proposition deemed essential by the defendant is not to be regarded as error, unless he made a request for such instruction. (*People v. Fice*, 97 Cal. 460, [32 Pac. 531].) This has been applied to an instruction as to intoxication in the case of *People v. Oliveria*, 127 Cal. 381, [59 Pac. 772].

We have considered defendant's objections to the instructions given by the court, notwithstanding the attorney general's position that they are part of the judgment-roll and are reviewable only as part of the judgment-roll and that the record does not disclose the judgment from which the appeal was taken. It is unnecessary to determine the question of practice raised, in view of the rulings made on the questions of law, further than to say that we do not adopt the views of the attorney general as applied to this case.

The defendant suffered no injury because the court refused to require Mrs. Dripps to repeat to the jury in open court upon her direct examination the proposal which she said was made to her by her assailant. The information desired was obtained by defendant on cross-examination in answer to his counsel's question. The response was given to defendant's counsel in the manner requested by him, that is, in writing, and if it failed to reach the jury it was the defendant's own act. It cannot be presumed that, had he insisted upon an oral response, and not accepted the written one, the court would not have required the witness to answer him orally. No constitutional right of the defendant was invaded. It is not a constitutional right of the defendant to

have the prosecution conduct its case in accordance with his wishes, and there was no interference with the fullest exercise of his right of cross-examination in the case in this connection.

The remarks of the district attorney specified as error and misconduct upon his part were all within the bounds of legitimate inference from the evidence, except one. The statement, outside the record, "that the shirt defendant wore the night of the alleged assault had not been in the possession of the prosecution, and that it must be in the possession of the defendant," was the statement of a fact important to the case of the prosecution and highly prejudicial to the defendant. It would have been reversible error had the matter been called to the attention of the trial court at the time and that court had refused to instruct the jury to disregard the remark, but no opportunity was given the trial court to correct the abuse. It is essential, in order that such an act shall be reviewed by this court, that it shall first be called to the attention of the court below *at the time*, in order that the court may so act in the premises as, if possible, to avoid the error and prevent a mistrial. (*People v. Kramer*, 117 Cal. 647, [49 Pac. 842].) The effect of such a remark could have been removed by an instruction to the jury to disregard it. (*People v. Shears*, 133 Cal. 159, [65 Pac. 295].)

The jury were twice taken to view the place where the crime had been committed. On both occasions the proper safeguards were thrown around the jury and the proper cautions and instructions were given, except that on the first occasion the trial judge failed to accompany the jury to the scene. Misconduct of the jury at the first view was claimed by defendant, and presented, by affidavit, to the trial judge upon the motion for a new trial. This showing was met by counter and conflicting affidavits from the prosecution, and, by its ruling on the motion, the trial court ascertained the truth to be with the prosecution. This was a matter peculiarly within the province of the judge who tried the cause and this court will not disturb his finding. (*People v. Rushing*, 130 Cal. 449, [80 Am. St. Rep. 141, 62 Pac. 742].)

The defendant did not object to the first view being taken upon the ground that the jury were not accompanied by

the judge, but after the return of the jury into the court made this the ground of an exception, and asked the court to have the record to show the fact and his exception.

The learned judge who tried the case recognized the error committed by his absence from the first view and with the purpose of correcting such error, if possible, advised the jury of the error committed, and instructed them to disregard any and all information or impressions acquired during or by reason of the first view, and to eliminate everything seen or heard on that occasion in the same way that they should disregard any testimony ordered stricken out, and ordered that a second view be taken. No tenable objections to the proceedings in connection with the second view, or exceptions to the court's actions in relation thereto, appear in the record.

Appellant contends that it was irremedial error for the jury, under the instructions of the court, to view the premises without the presence of the judge of the court. That he was entitled to have the judge present as a constitutional right, and that his failure to object cannot be construed as a waiver. The attorney general, on the other hand, in support of the action of the trial court, urges, first, that: A view is not the taking of evidence, neither is it "the trial"; therefore, the presence of the judge is not necessary. Next, that if his presence be necessary, his absence is but an irregularity which the defendant could and did waive. And that the jury were instructed to disregard the first view, and the first view became merged into the second.

Whatever may be the rule in other jurisdictions, it is clear that the later decisions of the supreme court of this state are based upon the theory that in viewing the place in which an offense is charged to have been committed, under section 1119 of the Penal Code, the jury is "receiving evidence." (*People v. Milner*, 122 Cal. 184, [54 Pac. 833].) It was upon this theory that it was declared to be error for the jury to view the place in the absence of the defendant in a criminal case. (*People v. Bush*, 68 Cal. 623, [10 Pac. 169]; S. C., 71 Cal. 606, [12 Pac. 781].) It must also be accepted as the law of this state that the judge is a component part of the court, and there can be no court without the judge. And that a defendant convicted under such circumstances has been deprived of his liberty without due process of law. (*People v. Tupper*, 122 5 Cal. App.—22

Cal. 424, [68 Am. St. Rep. 44, 55 Pac. 125]; *People v. Blackman*, 127 Cal. 248, p. 251, [59 Pac. 573]; *People v. Yut Ling*, 74 Cal. 570, [16 Pac. 489].)

The opinion in *People v. Blackman*, in so far as it has any bearing on the question here involved, relies upon the opinion in *People v. Tupper*, which, in turn, rests upon *O'Brien v. People*, 17 Colo. 561, [31 Pac. 230], *Turbeville v. State*, 56 Miss. 793, and *State v. Beuerman*, 59 Kan. 586, [53 Pac. 874].

The Colorado case mentioned (*O'Brien v. People*) is expressly distinguished, by the justice writing the principal opinion therein, from one in which there is a waiver, or consent to, the absence of the judge. The chief justice, in a concurring opinion, says that every absence of the judge from the courtroom during a criminal trial is *not* reversible error. He concurs in the decision because an error was committed by taking the testimony of a witness away from the courtroom, in the presence of the jury, when the judge was absent.

In *Turbeville v. State*, the decision of the court, as stated in the syllabus, is, that: "The circuit judge's absence from the bench during the argument of a felony case is *not* such abandonment of the court and conduct of the trial as that the judgment should be reversed, if he remains in an adjoining room within hearing with a lawyer on the bench to call him if needed." The portion of the opinion supporting the California cases is: "If we would consider this statement of the facts as showing such absence from the room on the part of the judge as constitutes a temporary relinquishment of the control of the court and of the conduct of the trial, we should unhesitatingly reverse the judgment. There can be no court without a judge, and his presence as the presiding genius of the trial is as essential during the argument as at any other time."

In *State v. Beuerman* it is said: "If the presiding judge abandons the trial, or relinquishes control over the proceedings, the accused has good cause to complain. (*Meredeth v. People*, 84 Ill. 479; *Thompson v. People*, 144 Ill. 378, [32 N. E. 968]; *State v. Smith*, 49 Conn. 376; *Turbeville v. State*, 56 Miss. 793; *Palin v. State*, 38 Neb. 862, [57 N. W. 743]; *O'Brien v. People*, 17 Colo. 561, [31 Pac. 230].) The fact that the court may not see or hear everything occurring in the courtroom, or that he may step into an adjoining room, but not out of hearing of the proceedings, is not necessarily

prejudicial to the interests of the defendant in every case; but the presiding judge cannot safely absent himself from the trial, or relinquish control over the proceedings *during the trial*." If the language of this opinion be considered in connection with the holding by the Kansas court in *State v. Adams*, 20 Kan. 311, that a view of the premises by a jury is not receiving evidence during the trial, and the absence of either judge or defendant therefrom not error, because the statute does not in terms require them, or either of them, to be present, it is apparent that the Kansas court would regard that case as not applicable here.

In *People v. Yut Ling* it is said: "When the jury went to view the premises, the judge of the court should have gone along with them. It was the right of the defendant to have the judge accompany the jurors when they went to take this view." We are left in the dark as to the reasons of the court for its position on this question, and Justices McFarland and Paterson dissent from the decision without comment. In the absence of reasons given, we have assumed that the court considered the view as receiving evidence (*People v. Bush*), and a part of the trial, and therefore the absence of the judge from the trial was error. (*People v. Tupper*, 122 Cal. 424, [68 Am. St. Rep. 44, 55 Pac. 125].)

Accepting these cases as declaring the law of this state, and considering them in the light of the reasons given for the decisions upon which they rest, it is apparent that the error committed by the court here is such an error as may, in a proper case, be corrected by the court, and the right to object thereto may be waived by the defendant.

The view has been a part of the jury trial since its origin, and at one time constituted, with the personal knowledge of the jurors, the entire evidence considered by the jury in arriving at its verdict. There is nothing in the reports of the earlier English cases to indicate that the judge was required to be present at the view, and the practice permitted a view by either a part or the whole of the jury. In some of the cases the courts seemed concerned chiefly in determining how many jurors, or what part of the jury, must have visited the scene in order to sustain the verdict. For many years after other evidence than the knowledge of the jurors began to be considered by the jury, the view continued to be the main evidence received in cases of waste, trespass and nuisance. It

is still made an important part of the evidence in cases of waste in some states, and in other states in cases of eminent domain, by express statutory provisions. The personal knowledge of the juror can no longer be considered, unless he be sworn and examined in open court (Pen. Code, sec. 1120), the freedom of the common-law view is much restricted, its use now rests in the discretion of the trial court, and the whole matter is generally regulated by statute. In construing these statutes the courts have reached widely divergent conclusions. The opinions range from those holding that a statute providing for a view of the premises in a criminal case, similar to section 1119 of the Penal Code, is unconstitutional because such a view is receiving evidence by the jury when absent from the court (*Foster v. State*, 70 Miss. 755, [12 South. 822]), to those holding that the view is no part of the trial, and that the jury are not receiving evidence, but merely receiving impressions from inanimate objects that will enable them better to comprehend and apply the testimony in the case. (*State v. Adams*, 20 Kan. 311; *Shular v. State*, 105 Ind. 289, [55 Am. Rep. 211, 4 N. E. 870]; *People v. Johnson*, 110 N. Y. 134, [17 N. E. 684]; *People v. Thorn*, 156 N. Y. 286, [50 N. E. 947]; *State v. Mortensen*, 26 Utah, 312, [73 Pac. 562].)

This diversity of conclusion appears to be due, largely, to the restriction of the term "the trial" to the permanent proceedings in the courtroom, and an effort of the courts to evade the apparently inevitable result of that construction upon the case under consideration.

Every step taken in a criminal case, by, or in, the court wherein the case is pending, from issue joined to verdict rendered, is a step or proceeding "arising during the course of the trial." (*People v. Turner*, 39 Cal. 370.) In this extensive sense, "the trial" would include many occasions when the judge need not be personally present exercising control or conducting the trial. This is the case where the jury are kept together during the entire trial. Between the sessions of the court they are under the sole control of the sheriff, and if they make an unauthorized visit in a body to the place where the crime was committed, while in charge of that officer, the error may be waived, and the court can consider whether or not the view influenced the minds of the jurors, in ruling on a motion for a new trial. (*Warner v. State*, 56 N. J. L. 686,

[44 Am. St. Rep. 415, 29 Atl. 505].) The same rule was applied in a case in which the gist of the action on trial was the condition of the *locus in quo*. (*Rush v. St. Paul*, 70 Minn. 5, [72 N. W. 733].) The inquiry is, "Was the (misconduct) not calculated to prejudice the result of the trial? Is it apparent that it could have had no influence upon the verdict?" (*People v. Stokes*, 103 Cal. 193, [42 Am. St. Rep. 102, 37 Pac. 207].) Such error should be objected to at the time, and consent of defendant or his failure to object in time will defeat his right to complain. (*People v. Tarm Poi*, 86 Cal. 225, [24 Pac. 998]; *People v. Fitzgerald*, 137 Cal. 546, [70 Pac. 554].)

This same test has been extended to an absence of the judge from the courtroom, without suspending the trial, during the examination of a witness for the prosecution (*Hays v. State*, 58 Ga. 35), and during the argument of the case. (*O'Shields v. State*, 81 Ga. 301, [6 S. E. 426]; *Pritchett v. State*, 92 Ga. 65, [18 S. E. 536].)

The conditions surrounding the jury at the view; the restrictions upon their actions and that of the judge; the inability of the judge or anyone else to control or direct their observations to any objects other than those indicated to the person appointed as "shower" while in open court at the courtroom; the absence of any assistance of counsel to indicate the details of the observation which make for their respective clients; the prohibition of the taking of testimony or receiving of any other information than that given by the "shower," coupled with the statutory requirement that the jury be placed in the custody of the sheriff, might call for a distinction between the modified form of trial at the view and the proceedings taken and had in the courtroom, if this were necessary to this decision. But the rule having been established in this state that the defendant is of right entitled to have the judge present at the view, the modified character of his functions there becomes immaterial.

Considering the absence of the judge as involving the question of whether or not it be depriving the defendant of his liberty without due process of law, we see no reason why the rule above declared should not be applied to the error committed.

Due process of law undoubtedly means, in the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights;

and that changes of forms, proceedings and process from time to time shall be made with due regard to the landmarks established for the protection of the citizen. (Cooley's Constitutional Limitations, 355.)

Many of the common-law, statutory and constitutional rights of a defendant may be waived by him, and some will be presumed to have been waived if they have not been asserted in a timely manner. He is entitled to be tried by a full common-law jury on a charge of felony before sentence, but he may waive all the incidents of the trial established for his protection and enter a plea of guilty. He is entitled to challenge jurors both for cause and peremptorily without assigning cause, but if he fails to do so, having had the opportunity, it is too late to complain after conviction. So it is with having the process of the court to secure the attendance of his witnesses, and his right to have only competent evidence introduced upon the trial. Failing to assert his right, he is deemed to have waived it.

In the case at bar, the defendant had an opportunity to assert every legal right involved, and either failed to do so, or asserted them in such a manner that he is deemed to have waived them. If the first view be left out of consideration, the record would show a complete trial unattended by any prejudicial error preserved and excepted to as required by the rules of practice. The first view was no more prejudicial to the defendant than the introduction of incompetent evidence during the trial, which, on discovery of the error by the court, was directed to be stricken out, and the jury instructed to disregard it. The jury were aided in doing this by the subsequent view. The impressions obtained from the two views would be presumed to be the same, as the second view covered the same grounds, the shower pointed out the same places and objects, and the affidavits produced on the motion for a new trial show that there was no change in the location of the objects viewed, or the topography of the scene, between the first and second views. If a different impression were obtained, that from the second being more recent would no doubt be the more vivid at the time of the deliberations of the jury.

There was no dispute at the trial in relation to the location of any of the objects which were seen by the jury on either view. The evidence in relation to the disputed matters was

directed to the angle at which the lights fell upon certain objects and places, the effect of the distance of the street lamps from the scene, and the strength of the light that would be given by them at the place of the occurrence. Even this evidence was of minor importance, as the complaining witness based her ability to see so distinctly upon the fact that the headlight of a passing street-car fell upon the face and clothing of her assailant. Both of the views by the jury were taken in the daytime, and there was no opportunity on either occasion to observe the effect of the lights upon the scene. The case was one in which a view was proper and served the purpose which should be the primary, if not the only, consideration in criminal cases, to wit, a knowledge of the premises that the jury may the better apply the testimony heard in court. The evidence received on both views was evidently of this character.

However the error be classified or considered, the facts disclosed by the record, on the motion for a new trial, warranted the trial judge in finding that the prosecution had sustained the burden of showing that no injury resulted to defendant's case, and that he was not prejudiced by the absence of the presiding judge from the first view.

No timely objection to the absence of the judge from the first view was made; such absence was not prejudicial to the defendant or subversive of his legal rights, and there is no ground for granting a new trial. (*Horne v. Rogers*, 110 Ga. 362, [35 S. E. 718].)

It is not every unauthorized view of the *locus in quo* that will require the setting aside of a verdict. Considerations of practical justice forbid it. If verdicts were set aside for such reasons, there would be no reasonable limits to litigation, especially in cities where the opportunities are great for jurors personally to view the locality of a crime under consideration.

Judgment and order appealed from affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 258. Third Appellate District.—April 3, 1907.]

HALE BROS., a Corporation, Respondent, v. **EDWARD F. MILLIKEN** and **FOSTER MILLIKEN**, Copartners, etc., Appellants.

ACTION FOR BREACH OF CONTRACT—FAILURE TO DELIVER STEEL FOR BUILDING AS AGREED—DAMAGES—SUPPORT OF VERDICT.—In an action to recover damages for breach of contract in failing to deliver steel for plaintiff's building, as agreed, where there is sufficient evidence to show that the contract was broken in failing to deliver the steel in the condition and within the time required, and the evidence was conflicting as to the damages arising from the breach, and the verdict for the plaintiff was sufficiently supported by the plaintiff's witnesses, the verdict cannot be disturbed upon appeal.

ID.—LIMIT OF POWER OF APPELLATE COURT—REVIEW OF EVIDENCE.—The evidence must be so plainly and palpably insufficient to support the verdict that it can be said that such is the case, as matter of law, before this court is justified in setting aside a verdict upon the evidence or disturbing the findings of the trial court. A verdict finding the facts in a particular way forecloses any inquiry as to the credibility or discredit of witnesses by cross-examination.

ID.—EVIDENCE—CIRCUMSTANCES ATTENDING CONTRACT—KNOWLEDGE BY DEFENDANT'S AGENT—DAMAGES RESULTING FROM BREACH.—Evidence was admissible to show all of the circumstances leading up to and attending the execution of the contract which were known to the defendants through their agent acting within the scope of his authority in the execution thereof, including a lease which explained the necessity for prompt delivery required by the contract; and when such special circumstances were thus known to both parties, the damages resulting from the breach of the contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from its breach under such known circumstances.

ID.—EVIDENCE OF USAGE INADMISSIBLE—LEGAL STANDARD OF WEIGHTS AND MEASURES.—Where there is nothing in the contract to show the adoption of any other standard for the measurement of steel furnished under the contract, the legal standard of weights and measures fixed in this state must be deemed to enter into and become part of the contract executed therein, and evidence of local usage in San Francisco among manufacturers of and dealers in structural iron and steel to give a figured or estimated weight according to dimensions, instead of "scale" weight, determining the actual number of pounds therein, is inadmissible to vary the legal effect of the contract.

ID.—REPETITION OF EVIDENCE.—Where proposed evidence is already before the jury, no injury could result in disallowing its repetition.

ID.—REJECTION OF LETTER UNPREJUDICIAL.—Any error in the rejection of a letter from defendants' agent to plaintiff's agent was without prejudice, when defendants presented to the jury all that could by any possibility have been shown by the rejected letter.

ID.—LETTER ADMITTED ON CROSS-EXAMINATION—RIGHT OF EXPLANATION. Where a letter written by a witness was admitted on cross-examination, as tending to show a discrepancy, the witness was properly allowed, on re-examination, to explain the circumstances under which it was written, and the reason for writing it.

ID.—INSTRUCTIONS.—*Held*, that in the instructions given, in view of the circumstances of the case developed by the evidence, there was nothing that could have prejudiced the appellants.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. W. P. Lawlor, Judge.

The facts are stated in the opinion of the court.

P. H. Dunne, and Walter H. Linforth, for Appellants.

Campbell, Metson & Campell, Jas. H. Budd, and Thomas H. Breeze, for Respondent.

HART, J.—The plaintiff corporation brought this action to recover from the defendants the sum of \$13,973 for damages alleged to have been sustained by it on account of the failure of defendants to deliver within the time agreed upon certain steel to be used in the erection of plaintiff's building in the city of San Francisco. The alleged damages consist of the following items: 1. The sum expended by plaintiff in the preparation of the steel for use after its delivery, \$577.65, the pleaded agreement being that it should be delivered in condition so that it could be placed as received in the building; 2. Ground rent at the rate of \$1400 per month for a period of three months; 3. Interest on the money expended by plaintiff in the building independent of the steel work during the time of the delay, aggregating the sum of \$396.32; 4. The loss to plaintiff of the use of the building for three months, alleged to be of the value of \$3,000 per month, or a total of \$9,000.

On the twelfth day of October, 1899, plaintiff leased from one David R. Jones, for a term of ten years and nine months, the said lease to take effect on the first day of October, 1899, at a monthly rental of \$1,400, a certain lot or piece of real property, situated in said city of San Francisco, and upon which it contemplated the erection of a large building to be used for carrying on and conducting its commercial business. Ground rent was not, however, to become payable under the lease until from and after the 1st of July, 1900. It is alleged by plaintiff that with a knowledge of this lease and of its terms, defendants entered into a contract with plaintiff to furnish the steel necessary for the erection of said building and to deliver the same during the month of February, 1900. It is claimed by plaintiff that if the steel had been delivered during said month of February the building could have been "erected and completed so as to admit of occupancy on July 1st, 1900, but that the building was not completed and ready for occupancy before the 1st of October, 1900, and that the delay was occasioned through the failure of the defendants to deliver the steel within the contract time and to deliver in such condition as to be immediately set up in the building upon its arrival in San Francisco." The complaint further alleges that during the negotiations between plaintiff and defendants for the furnishing of the steel for said building "defendants submitted to plaintiff two lists of prices at which they agreed to sell and deliver to plaintiff the steel work required in said building. One of said list prices was for the delivery of said steel work during the month of February, 1900, and the other for the delivery of said steel work during the month of May, 1900; that the prices on the latter list were much lower than those on the other, and both lists of prices provided for f. o. b. delivery." In order to secure the delivery of the steel in the month of February, it is alleged, plaintiff, on the tenth day of January, 1900, agreed to pay the defendants the prices demanded for the February delivery of the steel, the same being a sum in excess of that of the May delivery to the extent of \$4,105.22. The complaint was verified.

The answer specifically denies the averments of the complaint, and pleads a counterclaim, and prays, among other things, for judgment against the plaintiff for the sum of \$6,884.50, alleged to be the balance due defendants from plain-

tiff for the structural steel so furnished it by defendants. It may be here stated that the original balance claimed to be due defendants from plaintiff was the sum of \$7,042.65, but that the sum of \$156.15 was deducted by defendants from their claim because of extra labor imposed upon the steel-setter by reason of "shop errors" imputed to the oversight or negligence of defendants in arranging the steel, preparatory to its erection as a part of the building.

The cause was tried by jury, and a verdict returned in favor of plaintiff in the sum of \$186.41, "after deducting the amount of defendants' counterclaim." Thereupon, and in accordance with said verdict, the court entered its judgment in favor of plaintiff in the sum of \$186.41. Defendants appeal from said judgment and from an order refusing them a new trial.

Much space in the briefs of counsel is devoted to a discussion of the evidence, appellants attempting by a minute examination and analysis thereof to demonstrate that the jury awarded damages in favor of plaintiff far in excess of what the facts adduced justified. The contract for the purchase and sale of the steel for the building was made and entered into between Reid Bros., architects and agents of plaintiff, and N. L. Bell, the Pacific Coast agent of defendants. The place of business of defendants was at the time of the transaction in the city of New York, and the headquarters and office of their agent, Bell, were, at the time of the making of the contract, in the city of San Francisco.

The record consists of a transcript of four hundred and ninety pages, of which the evidence takes up approximately four hundred pages. It would be useless, we think, to undertake to discuss in detail the entire mass of evidence, or to attempt to present a satisfactory synopsis thereof, for the purpose of showing reasons why the verdict should or should not be disturbed. The record discloses the fact that most of the evidence is from witnesses produced by plaintiff, and that it points almost all one way. There is no dispute that a contract for the sale and purchase of the structural steel required for the erection of the building of plaintiff was made by the parties. The only questions in the case are, so far as the facts are concerned, whether there was on the part of the defendants a breach of the terms of the contract, and, if so, whether or not the damages awarded are excessive.

The plaintiff, having leased for a long term the ground upon which the building was to be erected at a monthly rental of \$1,400, to become payable on and after the first day of July, 1900, was, quite naturally, anxious to secure the steel materials necessary for the construction of the structure at as early a date as possible, so as to enable the contractors to complete and have it in readiness for occupancy by the time at which payment of the ground rent was to begin. That this purpose was uppermost in the mind of plaintiff, and well understood by defendants at the time of the making of the contract, is, in our opinion, indubitably evidenced by the several conversations shown to have taken place between the parties relative to the steel contract. These conversations are testified to not alone by witnesses friendly to plaintiff, but by Mr. Bell himself. The telegraphic dispatches from Bell to the defendants concerning the contract also sustain this conclusion. Another significant circumstance bearing out the contention of respondent upon this point is the fact that the plaintiff was willing and agreed to pay for the steel the sum of a trifle over \$4,000 demanded for February shipments in excess of the prices asked for May shipments. In other words, it agreed to pay \$4,000 more for the steel in order to secure early shipments and delivery thereof than it would have been compelled to pay for the same material delivered in the month of May. The lease of the ground and the time at which the payment of the rent, by the provisions of said lease, was to commence, and the consequent anxiety of plaintiff to be in actual occupancy of the premises by the time the payment of the rent was to begin, were matters of full and frequent discussion between the parties, not only before the agreement of sale and purchase between them was reached, but throughout the entire course of the relations established between them by virtue of the contract. Telegrams were sent to defendants by their agent, explaining the circumstances under which the contract was made. While it may be correct to say that nothing was expressly said in these telegrams about the lease, the defendants, nevertheless, knew that haste and prompt delivery of the steel were important features of the contract, as is clearly shown by their replies to their agent. But, whether the defendants themselves knew, or did not know, the reason for the requirement of prompt delivery, the fact is undisputed that their agent did know the reason and knew

that that was the principal consideration controlling plaintiff in awarding the contract for the steel to the defendants. After the defendants, in response to a telegram from Bell, sent by wire the "February prices" for the steel required, the plaintiff, through its agents, Reid Brothers, in a letter addressed to Bell, accepted the same, and requested the latter to inform defendants that the plans, specifications and drawings were with P. C. Hale, at 256 Church street, New York, and, in order (quoting from the letter to Bell) "to save time, to please ask your firm to call on P. C. Hale for the drawings and specifications . . . to look over carefully and wire you if everything is complete to proceed at once." In pursuance of this suggestion, Bell sent the following telegram to defendants: "Get plans P. C. Hale, 256 Church street. Have secured contract. Prices quoted *February delivery*. Examine plans and wire immediately if everything is clearly shown thereon." The evidence shows that defendants, upon receipt of the last-quoted dispatch, at once obtained from P. C. Hale the plans and specifications mentioned. On the following day, Milliken Brothers wired their San Francisco agent as follows: "Plans received and are being carefully examined. . . . The specifications call for Carnegie sections. Our bid of course was not based on their sections. . . . We suggest, in order to secure *prompt delivery required* [italics are ours], that we be allowed to substitute equivalent areas of angles and plates, or channels and plates, whichever can be secured quickest, in column schedule." Reid Bros., having been notified by Bell of this telegram and the proposed substitution of "equivalent areas of angles and plates," etc., for the Carnegie sections called for by the plans and specifications, addressed the following letter to the agent of the defendants: "There is no objection to your people substituting equivalent areas of equal strength and not exceeding in weight those shown of Carnegie Steel Company. . . . *Prompt delivery* has secured you this work, and is a very essential feature of the contract, so do not fail to impress upon your people the importance of it, and also the importance of shipping in the regular order called for in specifications." The order of shipments, contained in the specifications, provides: "In order to avoid delay in erection, material must be shipped in the order in which it is to be placed, i. e., beginning at the basement, each story and floor must be shipped in such complete man-

ner as to allow each of said stories or floors to be entirely completed in its erection, and ready for immediate reception of masonry and walls." A few days after the 10th of January, according to the testimony of Mr. Bell himself, Mr. Reid informed him that the first shipment of steel would be required the last of February or the first of March. This shipment was to include all the material necessary to complete the first tier, and Reid requested Bell to have the steel shipped "tier by tier at intervals approximately one week apart." By "tier" was meant a floor complete—that is, one story. The foundation work was finished during the month of February, and the construction had so far progressed that by the 1st of March the builders were prepared to begin the erection of the steel work.

The evidence shows that the building was not completed so that it could be occupied until about the 1st of October, 1900—approximately, if not actually, three months after the payment of ground rent, under the lease, had commenced. Witnesses for plaintiff—real estate dealers in San Francisco—testified as to the rental value of the premises from July 1, 1900, to October 1, 1900, and such value was by them variously estimated at from \$2,500 to \$3,200 per month. Witnesses for the defendants placed the rental value at a considerably lower figure.

The delay in the erection and completion of the building was occasioned, according to the testimony of Reid, the architect, Lang, the brick and wood contractor, and Arthur, the steel-setter, to so-called "shop errors"—that is, errors made at the manufactory in the numbering of the columns and the adjustment of the connections of the steel—and to misshipments—that is to say, shipments out of order and in a haphazard manner. For illustration, it was stated by Mr. Reid that the first tier or floor was, as shipped, incomplete, and that tiers were shipped for floors not prepared or ready for steel erection in advance of those floors ready for the steel material. The delay thereby occasioned had, it is shown, and, as would necessarily follow, a reactionary effect upon the work of masonry and carpentry. In other words, the brick and wood contractors were necessarily delayed by reason of the delay due to the misshipments. The building is not what is known strictly as a steel structure. Mr. Reid testified that the delay, caused by the manner in which the steel was

shipped, covered a period of three months. Mr. Lang, the brick and wood contractor, stated that the delay in brick and carpentry work, occasioned by the nonarrival of the steel at the time and in the manner and order in which the contract called for its shipment, was two months and eighteen days.

There is no evidence in the record offered by the defendants directly contradictory of that of which we have presented a recapitulation. Counsel for defendants, however, undertake to show by an extensive argument based upon certain apparent discrepancies developed through the cross-examination of some of the principal witnesses for the plaintiff, that the amount of damages assessed by the jury is unwarranted by the evidence. But, under the well-understood rule, where there appears a substantial conflict in the evidence (and we think, as we have before suggested, that the testimony was pretty much all one way upon the important points), we are precluded from going into the question thus presented. The evidence must be so plainly and palpably insufficient to support the verdict that it can be said that such is the case as a matter of law before this court is justified in setting aside a verdict upon the evidence or disturbing the findings of the trial court. The record here does not authorize us to make any such ruling. The discrepancies or inconsistencies which may have been brought out by an examination or by cross-examination of the witnesses are also matters for the jury to pass upon and settle to their own satisfaction. Their verdict, finding the facts in a particular way, forecloses us from any inquiry into the question as to whether certain witnesses declared the truth or otherwise, or whether inconsistent statements which may have been shown by their cross-examination were sufficient to have discredited their testimony or not. The statement thus made of this proposition is only a trite declaration of the rule by which appellate courts are uniformly governed in this country with respect to their power of reviewing questions of fact. It is enough to say, however, that we have given the record careful and painstaking examination, and our conclusion is, upon this point, that the verdict and judgment are abundantly supported by the evidence.

There were numerous objections interposed against the admission of certain evidence, some of which are not discussed in the briefs, and, therefore, not urged here. As to some

of the objections, it may be said, generally, that in a case of the character of the one at bar, as disclosed by the pleadings, it is proper to show all the circumstances surrounding the transaction leading up to the making and the manner of the execution of the contract. The circumstances which led to the making of this contract were fully made known to the defendants, or their agent, who was acting within the scope of his authority as such in all his dealings with plaintiff, and it was, as we have declared, proper to place them before the court and jury. The lease between plaintiff and Jones, which explained the reason of the requirement of an early and prompt and proper delivery of the steel, and to the admission of which into the record objection was made, not only constituted relevant but important testimony. It, in fact, became a part of the contract, through other testimony, to the extent of fixing the time at which the steel should be delivered. Evidence of consequential delay—that is, the delay occasioned to the contractor of the masonry and woodwork and the delay caused to the steel-setter, was proper to be received and considered by the jury in the determination of whether or not the contract was, in fact, broken through the negligence of defendants and as finally aiding in the ascertainment of the amount of damages, if any, to which plaintiff was entitled by reason of the alleged breach of the contract. It would seem to require the citation of no authorities to uphold the position that special circumstances, if any, which might have entered into the making of the contract, or those attending its breach, if known to both parties, may be shown. The principle authorizing such evidence is quite elementary, and the books are replete with authorities illustrating its application. “If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under the special circumstances, so known and communicated.” (*Hadley v. Baxendale*, 9 Ex. 341; see, also, *Mitchell v. Clarke*, 71 Cal. 163, [60 Am. Rep. 529, 11 Pac. 882]; *Hawthorne v. Siegel*, 88 Cal. 159, [22 Am. St. Rep. 291, 25 Pac. 1114], et seq.; *Booth v. Mill Co.*, 74 N. Y. 15;

Long Island R. Co. v. Verree, 69 N. Y. 489; *Richardson v. Chynoweth*, 26 Wis. 656.)

But the most important point presented is raised by the contention that the court below erred in refusing to permit defendants to show that there prevailed, and for many years had existed, in the city of San Francisco, "a general well-known usage among manufacturers of and dealers in structural iron and steel, similar to that furnished by defendants, as to the manner and way by which the weight of the material was determined and arrived at." The contract is silent, so far as express language is concerned, as to how the weight of the steel was to be determined—whether by what is known as "figured" or estimated weight, or by "scale" weight. The former, as we understand it, is the means of ascertaining the weight by a standard, fixed and adopted by dealers in structural steel. For example, steel columns, girders and other connections necessary for the steel part of the structure, according to their dimensions, are given a standard weight by manufacturers and dealers in such materials. "Scale weight" is the determination of the weight by what the material actually weighs in pounds. It is contended by appellants that if there existed in San Francisco, at the time of the making of the contract, among dealers in such material, a custom, according to which the manner or method of ascertaining the weight of structural steel was determinable, then the contract is to be presumed to have been made with reference to such custom and that it, therefore, became a part of said contract. Several California cases are cited in support of this view, but we do not think that they are exactly in point, or, at least, ought not to be held applicable to the case here. The contract is evidenced by conversations, telegrams, letters, and the plans, specifications and drawings. There is no controversy between the parties that the prices offered by defendants and accepted by plaintiff were for "so much per pound"; but it is claimed by appellants that the word "pound" "is of technical significance when used in connection with the sale of structural steel." But appellants first make the claim that their contention for figured weight is sustained by a certain clause in the specifications. The clause referred to reads: "Figured dimensions in all cases to be taken in preference to scale measurements, and no important dimensions shall at any time or under any

circumstances be determined by scale, but should drawings not show all required dimensions in figures, the contractor is to apply to the architects for such figures, and shall all conform to them as a part of the contract." According to the interpretation of that clause by appellants, the contract itself, of which the specifications became a part, expressly points out that the quantity of steel furnished shall be determined by figured or dimension weight. But that clause is not open to such a construction. If it were, then certainly, as pertinently suggested by counsel for respondent, the court's ruling in excluding the proffered testimony relative to the alleged custom could not be error, since to prove by parol what in terms the contract already provides for would be the work of supererogation or the assumption of an unnecessary burden by defendants. The clause is manifestly addressed to the contractor for his guidance in the erection of the building. The real meaning of it is so clearly explained in the brief of respondent that we shall adopt the language of counsel in the statement of what we conceive to be its true construction: "The clause plainly means that lengths are not to be calculated from the lines of the plans which obviously were drawn on a reduced scale. If dimensions are noted on the plans in figures, they shall prevail over scale or measured dimensions. If on any line the length is not noted in figures, the contractor must not calculate its length by scale, but must apply to the architect for the figures." The contention as to the meaning of that clause being thus disposed of, the question remains, Did the court err in disallowing the testimony offered to prove the alleged usage?

The legislature of this state has established a standard of weights and measures, according to which, by the provisions of section 3222 of the Political Code, "all contracts made in this state for work to be done or for anything to be sold or delivered by weight or measure," must be construed. The standard of weights and measures is thus fixed by section 3209, *supra*: "The standard of weights . . . now in charge of the Secretary of State, being the same that were furnished to this state by the government of the United States, and consisting of . . . nine avoirdupois weights of one, two, three, four, five, ten, twenty, twenty-five and fifty pounds, respectively, . . . are the standards of weights . . . throughout this state."

There is no allegation in the answer, either in the denial of the averments of the complaint, or in the paragraphs setting out the counterclaim, that the word "pound," as used in the contract as pleaded, was understood by the parties in any other sense than its ordinary and primary and *legal* signification. It will, of course, be conceded that the phrase "avoirdupois pound," as used in the statute, and as commonly understood, means sixteen ounces in weight. (Pol. Code, sec. 3215.)

The case of *Higgins v. Cal. Petroleum Co.*, 120 Cal. 629, [52 Pac. 1080], so much relied on by defendants, was where the plaintiff brought an action to recover "certain royalties on certain bituminous rock and liquid asphaltum mined by defendants," for which the latter agreed to pay "the sum of fifty cents per ton for each and every *gross* ton." The question there was, What did the parties mean by the word "gross"? Evidence was admitted at the trial for the purpose of showing that by usage at the place where the contract was made the word "gross" as used in the contract means a "long ton," or a ton consisting of "two thousand two hundred and forty pounds," and the court made a finding accordingly. The supreme court sustained the ruling, saying: "The contention of appellant is, that the statute defines the meaning and use of the word 'ton' (Pol. Code, sec. 3222), and that the lease is unambiguous and cannot be explained or contradicted by parol evidence; therefore, there could have been no evidence at the trial justifying the finding of the court that the phrase 'gross ton' used in the lease meant a long ton of 'two thousand two hundred and forty pounds.' Some decisions are cited apparently holding that a contract of this nature must be conclusively presumed to refer to the statutory weights and measures—at least, in the absence of a direct and express reference in the contract to a different standard—and in this connection it is argued that the adjective 'gross' does not refer to the measure—that is, to the number of pounds in the ton—but to the condition of the commodity when weighed, to wit, that the crude and unrefined asphalt is to be weighed, and not the refined product. I think the question is entirely settled by section 1861 of the Code of Civil Procedure, which reads as follows: 'The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is nevertheless

admissible that they have a local, technical or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.' " The same question was presented in the case of *Higgins v. Cal. Petroleum Co.*, 109 Cal. 310, [41 Pac. 1087]. There no evidence had been offered or received relative to the meaning of the word "gross." The court, in the latter case, held that "gross ton" meant the usual ton of two thousand pounds avoirdupois, and that the word "gross" as used signified and was intended to describe the crude or unrefined product. In the case in the 120th Cal., subsequently tried, evidence was, therefore, admitted to show what must have been really intended by the use of the word "gross." It will thus be seen that the whole question in the Higgins case turned upon the meaning of the word "gross," as employed.

The very purpose, obviously, of laws establishing standards of weights and measures, is to render certain and unequivocal the meaning of the language of contracts involving matters to which such laws relate, by a comparison of the language of the contracts with that of the law, and thus relieve the courts, in some measure at least, of the perplexing difficulties which must often confront them in seeking the actual intention of the parties to such contracts. The legislature has wisely declared that it is the better policy that there should be a general law, effective and operative throughout the whole state, regulating such matters, and of which all persons are conclusively presumed to have knowledge, and through the assistance of which all contracts pertaining to the subject matter of the statute may be satisfactorily construed. Viewed thus by the light of the written law, it is manifest that the opportunity for mistakes in an effort to ascertain what parties mean by the language of such contracts is at least minimized, if not altogether obviated. "If," as is well said in *Evans v. Myers*, 25 Pa. St. 114, "every section of the country may have its own weights and measures, to be established by its own customs, strangers would be entrapped into liabilities which they never intended to incur, and no one could know with precision the extent of his obligations." (See, also, *Green v. Moffett*, 22 Mo. 529; *Harris v. Rutledge*, 19 Iowa, 388, [87 Am. Dec. 441].) The legislature certainly meant something by the enactment of the

law regulating weights and measures, and the rule involved in section 1861, Code of Civil Procedure, should not be so applied as to operate, practically, to repeal or nullify the entire chapter upon the subject of weights and measures. The law is founded upon experience and the soundest policy, and is, like all such enactments, designed for the better protection of the rights of parties acquired under such contracts. Is it to be doubted that the courts, in the construction of contracts, may feel an infinitely greater degree of assurance that they will arrive at a correct conclusion where in the exercise of that all-important judicial function they may be guided by the unflickering light of the written law rather than by some alleged usage of trade, proved, it may be, by conflicting evidence? We think the rule of construction of such contracts ought to be, as contemplated by the legislature, that they are to be conclusively presumed to have been made in reference to the statute, unless the parties themselves have agreed or indicated in their contracts that their execution is to be governed by some usage of trade or custom prevailing in the community where they were made, or their terms are to be performed. Such a construction would give force and effect to the statute and could not interfere with the operation in appropriate cases of section 1861 and other code provisions established for the interpretation of contracts whose terms are expressed in doubtful or ambiguous language. And when we use the term "doubtful or ambiguous language," we mean language whose true meaning can find no exposition by reference alone to the language of the law itself, an end which we think can be attained in the cases of contracts of the kind under consideration.

Section 3222 of the Political Code is garbed in language as clear as a cloudless day, and, as observed, provides that "contracts made within this state for work to be done or for anything to be sold or delivered by weight or measure, *must* be construed according to the *foregoing* standards," referring to the preceding section establishing the standards of weights and measures. Is it to be held that that section means nothing? Is there to be found any enacted proviso qualifying the provisions of the law as to weights and measures in any particular so that they may be disregarded with impunity?

In *Rogers v. Mechanics' Ins. Co.*, 1 Story, 603, 608, [Fed. Cas. No. 12,016], Judge Story uses the following language:

"I own myself no friend to the indiscriminate admission of evidence of supposed usages and customs in a peculiar trade and business, and of the understanding of witnesses relative thereto, which has been in former times so freely resorted to, but which is now subjected by our courts to more exact and well-defined restrictions. Such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and indefinite notions of the subject; and, therefore, it should, as I think, be admitted with a cautious reluctance and scrupulous jealousy, as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts."

At page 656 of the second volume of his work on Contracts, Judge Parsons says: "Where certain things are to be done by the contract which the law has regulated in whole or in part, the contract will be held to mean that they should be so done as would be either required or indicated by the law."

"The true office of usages of trade," says Greenleaf, section 251, volume 2, of his work on Evidence, "is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications, and acts of a doubtful and equivalent character; and to fix and explain the meaning of words and expressions of doubtful or various senses."

" . . . But, although evidence of custom and usage may be introduced in a case to show what the meaning of the parties was in regard to the subject matter of the contract, or to explain the meaning given in particular trades or occupations to certain words, yet evidence cannot be introduced of the custom when the same contradicts the plain and unambiguous words of the contract or violates a settled legal rule of construction." (*Bigelow v. Legg*, 102 N. Y. 652, [6 N. E. 107].)

The "settled legal rule of construction" in this state as to such contracts is to be found in the provisions of the law fixing the standard of weights and measures. The legislature has said so in section 3222 of the Political Code. The word "pound," whose meaning is sought to be modified or changed, does not and cannot render the contract ambiguous, because it is a statutory word. "Evidence cannot be introduced of the custom when the same contradicts the plain and unambiguous words of the contract," says the court in *Bigelow v.*

Legg, 102 N. Y. 652, [6 N. E. 107]. There is no claim here, either expressly made, or deducible from the pleadings, the evidence or the briefs, that during the negotiations of the parties there was any discussion by or understanding between them that the word "pound" should be used in the contract in any other sense than the usual or statutory one. The contract, as pleaded, is clear and unambiguous. There is no obscurity in its language, and there can be shown no just reason why the word "pound" should be subjected to an interpretation by one of the parties peculiar to himself or his own views.

We are not to be understood as questioning the ruling in the *Higgins* case, 120 Cal. 629, [52 Pac. 1080], in so far as it concerns the application of section 1861, Code of Civil Procedure, to the peculiar circumstances of that case. But we do think that the decision unnecessarily lays down the rule too broadly, and we have no hesitation in declaring that if the language of the opinion is to be interpreted as holding the rule to be of such indiscriminate and universal application in the matter of the interpretation of express contracts as to embrace all manner of such instruments, regardless of the language in which they are expressed, and including those which, in certain respects, the legislature has provided must be construed according to other rules adopted by it for that purpose, then we feel constrained to say that we cannot subscribe to it.

There is, however, no attempt made in the opinion in the *Higgins* case, 120 Cal. 629, [52 Pac. 1080], to combat the authorities which it is therein stated were "cited apparently holding that a contract of this nature must be conclusively presumed to refer to the statutory weights and measures—at least in the absence of a direct and express reference in the contract to a different standard." Nor is there anything suggested in that case as to what disposition is to be made of section 3222 and the other sections of the Political Code fixing the standard of weights and measures. The conclusion we have reached, after a careful examination of the question under discussion, is that all contracts involving "work to be done, or anything to be sold or delivered by weight or measure," must be, as required by section 3222, *supra*, construed by the light of the statute establishing in this state a standard of weights and measures, unless the parties have

expressly agreed to, or used language fairly indicating an intention to be governed by, a different standard; that if there ever existed anywhere in this state a custom or usage of trade in conflict with the sections of the Political Code referred to, it has been abrogated by those sections to the extent that the law shall prevail over such custom or usage of trade where the parties have not otherwise stipulated in their agreement. But we think that there are features in the Higgins case which distinguish it from this. The word "gross" is not used in the statute, and has, therefore, acquired no legal signification, whereas, as shown, the word "pound" is so used and is defined. That the phrase "gross ton" has a peculiar meaning in commercial usage is shown by the declaration of Justice Temple in the Higgins case "that the phrase 'gross ton' is often used in lieu of the phrase 'long ton' with which we are all familiar in commercial reports, and which always indicates a ton containing two thousand two hundred and forty pounds." The adoption of any other principle of construction than that by which we have been governed in reaching the conclusion here would, it seems to us, result in wiping off our statute books by judicial interpretation legislative provisions, against the wisdom of which no objection in our opinion can be made.

During the direct examination of James M. Reid, the plaintiff offered, and the same was received in evidence by the court, a letter, under date of March 17, 1900, addressed to Bell, and written and signed by Reid Bros. This letter called to the attention of Bell the fact that the steel-setters had experienced some difficulty in placing the steel columns, "the trouble resulting either from the improper placing of the brackets on the side columns, or the incorrect numbering of them." The inference from the letter was that the trouble and consequent delay was due to "shop errors" in adjusting the steel connections or mistakes made in marking the plan numbers by which the steel-setter should be governed in setting the steel, and for which errors and mistakes defendants were responsible. Testimony had been given on behalf of plaintiff that the steel materials had been marked with a shipping number which was plainly visible, and it also appeared that the plan numbers had been marked on the steel, but had been painted over so that they were somewhat obscure. The setter had undertaken to set the columns, etc., by the shipping

number and thus had made the mistakes which caused the delay in this particular. During the cross-examination of Reid, counsel attempted to put in evidence a letter from Bell to Reid Bros., dated April 6, 1900, upon the ground that it was a reply to the letter above referred to and explanatory thereof. The court sustained an objection to the admission of this letter. It is contended that the court erred in its ruling excluding the letter. The letter begins with, "I herewith return to you Mr. Arthur's bill of March 31st, and in reply will say that I have submitted a copy of this bill to the New York office, but in the meantime I do not consider Messrs. Milliken Brothers responsible for the mistake of Mr. Arthur in setting up the columns by the shipping number in place of the plan number." And then follows the explanation of how Mr. Arthur must have made the mistakes, and that the writer had pointed out the fact to him. The objection was that the letter was hearsay and self-serving. The offer was made, of course, under section 1854 of the Code of Civil Procedure, which provides that ". . . when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may also be given in evidence." The letter to which the one rejected is claimed to have been a reply is dated, it will be remembered, March 17th. The reference in the rejected letter to Mr. Arthur's "bill of March 31st" might indicate that it was not directly in reply to the letter of the 17th of March. There is, however, nothing in the excluded letter "which is necessary to make" the letter of March 17th understood. There is but one theory upon which we can perceive that the letter might have been properly admitted, and that is that Reid Bros., in their 17th of March letter, having at least by insinuation charged defendants with the delay due to the mistakes of the steel-setter, the refutation by the latter in the letter of April 6th of the charge would prevent the inference of acquiescence by apparent silence. But upon this theory the ruling is without prejudice to defendants, because Mr. Bell in his testimony (page 415, transcript) declared to the jury that the mistakes were due to the carelessness of the steel-setter; that Arthur had set up the steel according to the shipping numbers instead of the plan numbers; that the plan numbers were placed upon the materials so that they could easily be seen; that the

shipping numbers upon the columns did not correspond with the setting numbers upon the plans, and that he had pointed these facts out to Mr. Arthur. Thus, it will be seen, defendants presented to the jury all that could by any possibility have been shown upon that question by the rejected letter.

The witness Bell, in detailing a conversation he had with one of the Reid brothers, said, among other things, "that they would not hold us down strictly to February shipments." Upon motion of plaintiff the quoted portion was stricken out by the court, on the ground that it was "incompetent, irrelevant and immaterial testimony." The claim of plaintiff is that the statement is only a conclusion of the witness. The part stricken out appears with an extended statement made by the witness of a conversation with Reid and is presented in narrative form in the transcript, and it is somewhat difficult from the manner in which it thus appears to definitely say whether the language used by the witness was intended to represent what Reid actually said, or was only the witness' conclusion from what he said. The trial court was, of course, in a position to determine whether the part stricken out was a conclusion or not. But the ruling was harmless in any view, because, whether or not the shipments were to be made under the contract in the month of February was immaterial, if, as we think the evidence conclusively shows, the understanding of the parties was that shipments were in any event to be so made that the building could be completed and occupied by the 1st of July, 1900.

Nor do we think the court committed error in sustaining the objection to the question propounded to the witness Arthur: "The amount of the bill which you rendered for all of this riveting and reframing amounted to \$189, did it not?" The witness had already testified that the amount of the bill for the work referred to was the sum of \$189, and, therefore, no injury could have resulted to defendants by the refusal of the court to allow a repetition of the statement. The fact was before the jury for all the purposes for which it might be pertinently used in the case.

While Mr. Reid was testifying, a letter, written by his firm to the defendants, under date of June 8, 1900, was called to his attention on cross-examination by appellants, and on their motion admitted in evidence. The letter related to the differences arising between plaintiff and defendants by reason

of the delay in the completion of the building, and the causes thereof. On redirect examination, the witness, over the objection of counsel for defendants, was permitted to explain to the jury "under what circumstances that letter was written." The question elicited a statement to the effect that plaintiff was anxious to settle the trouble, and that witness had in view the purpose of "getting the lowest amount Hale would want to settle for, irrespective of figuring the damages, which it was impossible to do at that time." The letter fixed "the total time of delay at the minimum for the sake of amicable settlement, namely, one month and a half." As the time of delay suggested as the basis of settlement in said letter was considerably less than that to which the witness had testified in the case, it was important to present the reasons why and circumstances under which the letter was written. The objection was, we think, without merit. Defendants introduced the letter into the record, and if there were any inconsistencies or apparent inconsistencies between the statements contained in the letter and the testimony previously given by the witness on any material point in the controversy, it was proper for the witness, who was the author of the letter, to explain them. A witness who has made at another time statements at variance with his testimony would have the undoubted right to explain or reconcile them with his evidence as given in the case, if he could do so. There can be no reason why the same principle should not apply where the explanation is as to a letter written by the witness, where, of course, there is not imported into such explanation a statement of extraneous matters, or facts foreign to a legitimate explanation. The explanation seems to have been well within the purpose for which it was offered, introducing nothing which could serve any other end than to show the reason why the proposition submitted in the letter was made.

The following instruction was given by the court at the request of plaintiff: "The contract of sale is admitted in the pleadings. It is admitted that on or about the 10th of January, 1900, the plaintiff, Hale Brothers, purchased from the defendants, Milliken Brothers, and Milliken Brothers sold to Hale Brothers certain steel for their building to be erected in San Francisco, at certain prices per pound. That said steel was to be delivered f. o. b. New York City, during the

month of February, 1900. That said steel was to be prepared and shipped according to the plans and specifications prepared by Hale Brothers' architects. One of the specifications which became a part of the contract was as follows: . . . " It is insisted by appellants that this instruction is erroneous for the reason that, as they contend, while the answer does not deny the contract for the sale of the steel, it does put in issue the allegation that such steel was to be delivered during the month of February, 1900, or during any specified month.

At the request of defendant the following instruction was given by the court: "Defendants, in their answer, do not deny the making of the contract, *as alleged in the complaint* [the italics are ours] other than they deny that they agreed to deliver the steel at any other place than the City of New York, in the State of New York."

The contract, as alleged in the complaint, is as follows: "Plaintiff agreed to purchase and defendants agreed to furnish and deliver all the steel required by the plans, specifications and drawings made by the architects employed by plaintiff, to be used in the construction of a building to be erected by plaintiff on the lot of land leased, as aforesaid, by plaintiff from David R. Jones, at the following prices: . . . all of said steel work to be delivered f. o. b. to plaintiff during the month of February, 1900, to enable plaintiff to complete and occupy said building on or before the 1st day of July, 1900, and all of said steel work to be made and completed in conformity with the plans, specifications and drawings prepared by the aforesaid architects and delivered in such condition as to be immediately set up in said building."

The court submitted for determination by the jury the question as to the place at which the steel was to be delivered. The complaint nowhere by direct averment declares that the steel was to be delivered at any other place than New York city. We are of the opinion that the instruction complained of contained a fair statement of the contract admitted by the answer, and concerning the existence of which there was no controversy at the trial. The question at issue was not, whether a contract had, in fact, been made by the parties, but whether or not there had been a breach of the terms thereof by one of the parties. The criticised instruction contains practically nothing more than was embraced in the

instruction, from which we have presented an excerpt, given by the court at defendants' own request. It is true the answer denied that delivery was to be made in the month of February, but, even so, the appellants are not in a position to complain of an instruction which, in effect, only harmonizes with one given by the court upon their own suggestion. Besides, as we think we have shown, it is clear from the evidence that haste in the completion of the building was the controlling feature of the contract, as understood by both parties, and as pleaded. The complaint avers that the parties entered into the contract of sale with a plain understanding of the terms of the lease between Jones and plaintiff, and thus discloses the importance to the latter of the completion of the building so that it could be occupied by the first day of July, at which time payment of the rent for the ground was to begin. What we have said with reference to the ruling striking out certain portions of witness Bell's testimony applies with equal pertinency and force to the point under discussion. The important element of the contract was haste in the delivery of the steel—that is, such prompt delivery thereof as would insure the completion of the building by the time desired. Of what moment, then, could it be whether the steel was delivered in February or at a subsequent time, if the object sought by prompt delivery were nevertheless accomplished? Under the circumstances of the case as developed by the evidence the instruction could not have prejudiced the defendants.

There are many other errors assigned, some of which are referred to in the briefs of counsel as worthy of notice, but we deem it unnecessary to give them special attention. We have examined them all with care, and can see nothing in them impinging upon the substantial rights of defendants.

The judgment and order are affirmed.

Burnett, J., and Chipman, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 3, 1907, and the following opinion was then rendered:

HART, J.—We have given the petition for a rehearing of this cause careful consideration, and are unable to discover any reason for changing our views, as expressed in the main

opinion, upon the questions discussed. It may be suggested that, since filing the original opinion in this case, there has come to our notice the recent case of *Leonhart v. California Wine Assn.*, ante, p. 19, [89 Pac. 847], in which the court of the first appellate district discusses at some length the question of the resort to a custom or usage of trade for the purpose of interpreting the language of a written or other express contract. The authorities cited therein were not called to our attention by the attorneys in the case before us. We think some of them are applicable here. It appears to be the settled rule in this state, and ought to be, that where the contract is certain in its terms, parol proof of a usage is inadmissible. (*Withers v. Moore*, 140 Cal. 591, [74 Pac. 159].) We not only think that the rule thus stated is applicable here, but also reiterate our adherence to the position that, where a statute itself furnishes a rule of interpretation of certain contracts, as we think is the case here, that rule should be the sole guide of the courts in the interpretation of such contracts, unless the parties thereto, by said contract, have themselves interpreted the same, or furnished a rule by the stipulations of the contract for an interpretation different from that prescribed by the statute. The necessary effect of the application of the rule involved in section 1861 of the Code of Civil Procedure, to all cases of the interpretation of contracts, as contended for by counsel and as he insists is authorized by the opinion in the case of *Higgins v. California Petroleum and Asphalt Co.*, 120 Cal. 629, [52 Pac. 1080], would be to provide easy means of varying the terms of any written contract by parol, however plain and well understood the language of such contract might be. We cannot conceive a more dangerous application of a rule of construction or interpretation, and hardly think the court intended that section 1861, *supra*, should be pressed, in its application, to the extent to which the language in the Higgins case may be construed as carrying it.

We feel satisfied with the conclusion reached upon all the points made by counsel, and the petition for a rehearing will, therefore, be denied.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 31, 1907.

[Civ. No. 334. Second Appellate District.—April 8, 1907.]

MERIDIAN OIL COMPANY, Respondent, v. T. H. DUNHAM, Appellant.

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY REAL ESTATE TO CORPORATION—SUFFICIENCY OF COMPLAINT.—In an action by an oil company to enforce specific performance of a contract by defendant to convey three lots of land thereto, where the complaint shows that, in consideration of a purchase of land from the defendant, including the three lots afterward acquired by him for the purpose of erecting the refinery thereon, it had issued its capital stock, which defendant accepted and retained, and that it has erected valuable improvements on the three lots, which defendant had refused to convey, and alleged that the contract to convey the three lots was reasonable and just as to the defendant, it states a cause of action, and a demurrer thereto was properly overruled.

ID.—RULE AS TO PLEADING VALUE OF LAND INAPPLICABLE.—The well-recognized rule that in actions for specific performance the complaint must state the value of the land, or other facts showing that the consideration is adequate, is not applicable to the facts existing in this case.

ID.—ESTOPPEL OF DEFENDANT TO QUESTION ADEQUACY.—After accepting and retaining the agreed consideration for the whole purchase, the defendant cannot question the adequacy thereof.

ID.—PAROL CONTRACT—PART PERFORMANCE—IMPROVEMENTS.—Though the contract to convey the land was by parol, a specific performance of it may be enforced, when the payment therefor has been accompanied not only by a change of possession, but by a large expenditure of money upon the lots by way of improvements thereon, consisting of a number of tanks constituting a part of the plant of its oil refinery.

ID.—PLEADING AND PROOF AS TO IMPROVEMENTS.—Where the contract did not in terms call for an improvement, it was not necessary to allege or prove that the improvements upon the property were made pursuant to the agreement.

ID.—DOCUMENTARY EVIDENCE—ERROR NOT DISCLOSED.—Where no error in the admission or exclusion of documentary evidence is shown, for the reason that no copy thereof is included in the record upon appeal, it must be concluded that the ruling of the court thereon was correct.

ID.—ORIGINAL BOOK ENTRY SHOWING CONTRACT.—The original book entry showing the contract between the corporation and the defendant for the purchase of the land and lots described at a certain price,

to be paid for in stock, was properly admitted as showing the terms of the agreement with defendant as the president.

ID.—IMPROPER EVIDENCE—UNDERSTANDING AND INTENTION OF DEFENDANT—CONCLUSION.—Questions on direct examination of the defendant as to his understanding and intention to convey the lots in question were properly disallowed as calling for the conclusion of the witness.

ID.—DISPOSITION OF STOCK IMMATERIAL—AID OF COMPANY.—The subsequent disposition of the stock received in consideration of the purchase of the land and lots, by placing it in the hands of the trustees to aid the company in tiding over the financial distress, could not, in the absence of an agreement so to do, release appellant from his obligation to convey the property, and was immaterial.

ID.—ADVANCEMENT OF MONEY TO CORPORATION—POSITION OF CREDITOR.—The advance of money by the defendant to the corporation only placed defendant in a position in common with other creditors thereof, and could not entitle him to withhold the conveyance of the lots unless his claim was paid.

ID.—CONTRACT OF SALE—SUPPORT OF FINDINGS.—*Held*, that the evidence in the record conclusively supports the findings that the defendant entered into an agreement to sell the lots in controversy, and that his conduct was such as to estop him from claiming the contrary.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. G. A. Gibbs, Judge.

The facts are stated in the opinion of the court.

W. C. Batcheller, for Appellant.

Dunning & Craig, for Respondent.

SHAW, J.—Action to enforce specific performance of a contract to convey real estate.

On July 14, 1902, the plaintiff was a corporation having a board of three directors, of which defendant and his wife were members and president and secretary respectively thereof. It had in process of construction an oil refinery located upon certain lands, which were then owned or afterward acquired by defendant. At a meeting held on said date, all the directors being present, its board adopted a resolution to purchase from the defendant the real estate upon which it was constructing its plant, and pay therefor in capital

stock of the company, and authorized the secretary to issue said stock to the defendant. The stock was issued in accordance with said resolution and delivered to defendant, who conveyed, or caused to be conveyed, to plaintiff all of the property except the three lots involved in this action, and which he did not then own, but subsequently acquired. Plaintiff took possession of the property, including the three lots, and has made valuable improvements thereon, having a number of oil tanks located upon the lots, conveyance of which defendant withholds. After making these improvements, plaintiff learned the condition of the title and demanded a conveyance from defendant, and upon refusal to convey brought this action.

Appellant's demurrer was properly overruled. The allegations of the complaint sufficiently show that the contract was, as to the defendant, reasonable and just. The consideration for the sale was capital stock of plaintiff company. This was issued to and accepted by defendant, who executed a deed of conveyance to a part of the property. The well-recognized rule that in actions for specific performance the complaint must state the value of the land or other facts showing that the consideration is adequate is not applicable to the facts existing here. After accepting and retaining the agreed consideration, appellant cannot question the adequacy thereof. (*Nicholson v. Tarpey*, 70 Cal. 608, [12 Pac. 778].) The agreement to sell was based upon a parol contract. To justify a court of equity in enforcing the same, there must be, on the part of the purchaser, part performance thereof within the meaning of section 1741, Civil Code. Payment of the purchase price alone does not constitute such part performance. Such payment must be accompanied by a change of possession, or an expenditure of money upon the property. Not only was there a change of possession and payment of the consideration here, but a large expenditure was made upon these lots in the way of improvements thereon, consisting of a number of tanks constituting a part of the plant for its oil refinery. (*Calanchini v. Branstetter*, 84 Cal. 249, [24 Pac. 149].) As the contract called for no improvement, it was not necessary to allege or prove that the improvements upon the property were made pursuant to the agreement. (*Freeman v. Freeman*, 43 N. Y. 34, [3 Am. Rep. 657].)

An examination of the record discloses no error in the rulings of the court in admitting evidence. Neither the copy of the plat admitted in evidence, nor the certificate excluded therefrom, is included in the record, and without which we must conclude that the ruling of the court thereon was correct.

The book entry dated July 14, 1902, in the journal of the company, whereby it appeared that the company had bought from appellant the lots described in the resolution of that date and paid therefor in stock at a certain price, taken in connection with appellant's relation to the corporation as its president, was material as tending to show the parol contract with appellant, and was, therefore, properly admitted. The evidence offered by defendant relative to a sale of the company's property to one Jordan appears to have been wholly irrelevant, and was properly excluded.

On direct examination appellant was interrogated as to his *understanding* and intention as to what he was to convey and as to whether he *intended* to convey the lots in question to the company; all of which and other like questions called for the conclusion of the witness.

It was likewise wholly immaterial what appellant did with the stock received by him as consideration for the promised conveyance of the lots. The fact that it was, pursuant to a subsequent contract, placed in the hands of trustees to aid the company in tiding over its financial distress could not, in the absence of an agreement so to do, release appellant from his obligation to convey the property. Nor did the fact that he had subsequently advanced money to the corporation entitle him to withhold the conveyance unless his claim was paid. His position in this respect was one in common with other creditors. (*San Francisco Water Co. v. Pattee*, 86 Cal. 623, [25 Pac. 135].)

The main contention of appellant is that, if for no other reason, the judgment and order denying his motion for a new trial should be reversed upon the ground that the evidence fails to show an agreement on his part to sell the property. It conclusively appears from the record that defendant was president of the company; that he and his wife at the time of the adoption of the resolution held practically all of the issued stock; that he was present at the time the resolution was offered and adopted; that he accepted and retained

the stock named in this resolution as the consideration for the purchase of the lots therein designated and described; that he assisted in locating the lines of the property and with an employee staked out where to set the tanks on these lots; that he, in selling stock, represented to the purchaser thereof that the company owned these lots; and in the face of all this he strenuously contends that he never agreed to sell the lots in question. As we have seen, the adequacy of the consideration is not involved in the action. The court finds that the contract was fair and just as to defendant, and the evidence supports the findings. We cannot approve of the position for which appellant contends. It requires no authority to support the statement that one occupying the position with reference to a corporation held by appellant should be bound to the highest standard of good faith. Any other view would open wide the door for the perpetration of gross fraud.

What we have said as to the sufficiency of the complaint answers appellant's contention as to the court's failure to find any facts upon which it could be determined that the consideration was just and reasonable. The court did find the ultimate fact that it "was just and reasonable as to defendant."

Judgment and order appealed from are affirmed.

Allen, P. J., and Taggart, J., concurred.

[Crim. No. 86. First Appellate District.—April 12, 1907.]

In re SAMUEL M. SHORTRIDGE, on Habeas Corpus.

HABEAS CORPUS—COMMITMENT OF ATTORNEY FOR CONTEMPT—PRESUMPTION IN FAVOR OF ACCUSED.—Upon an application for a writ of *habeas corpus* to review the validity of the commitment of an attorney for contempt of the superior court, though the law does not permit the petitioner to contradict the recitals of facts set forth in the order of commitment, yet no presumption or intentions can be indulged in against the petitioner. The offense being criminal in its nature, both the charge and the finding of the court are to be strictly construed in favor of the accused; and the facts set forth in the commitment must be sufficient to show contempt within the meaning of the law, without the aid of intentions and presumptions.

ID.—INTERUPTION OF PROCEEDINGS OF COURT—FACTS NOT STATED.—

The statement that the attorney held for contempt interrupted the proceedings of the court, against the order of the court to cease such interruption, without stating what he said and did, does not comply with the mandate of the law that the facts occurring in the immediate view and presence of the court must be recited in the order. Many interruptions by an attorney may be lawful and proper, and the particular circumstances of the interruption must be set forth, in order that the commitment shall show on its face that the remarks of the attorney were out of the line of his duty as an official of the court, and to the party represented by him.

ID.—SUPPOSABLE FOUNDATION FOR CONTEMPT—CLIENT A FUGITIVE FROM

JUSTICE—FACTS NOT SHOWN.—A defendant in a criminal case who is a fugitive from justice, or who refuses to submit himself to the jurisdiction of the court, has no right to be heard in court by counsel, until he does submit himself to the jurisdiction of the court; and if the commitment had shown what does not appear therein, that the client of the petitioner was at the time of the acts complained of a fugitive from justice, and that the court for that reason had refused to permit him to address the court in behalf of his client, and that he nevertheless persisted in so doing, the action of the court in adjudging him guilty of contempt would be sustained. But this rule cannot apply where no such fact or reason is shown in the commitment for denying to the petitioner the right to address the court.

HEARING on *habeas corpus* to the sheriff of the city and county of San Francisco, to test the validity of a commitment for contempt by the Superior Court of said city and county. F. H. Dunne, Judge.

The facts are stated in the opinion of the court.

Peter F. Dunne, Frank P. Murphy, Henry Ach, Robert Ferral, and Charles H. Fairall, for Petitioner.

Hiram W. Johnson, for Respondent.

HALL, J.—Samuel M. Shortridge heretofore filed in this court his petition, wherein he alleged that he was illegally restrained of his liberty by Thomas F. O'Neil as sheriff of the city and county of San Francisco, and praying for a writ of *habeas corpus*, to be directed to said sheriff, which being granted, said sheriff in due time made return thereto that he held said Shortridge in custody by virtue of a conviction and judgment for contempt of court, a certified copy of the

commitment being attached to the return. At the hearing before this court petitioner excepted to the sufficiency of the return by way of a demurrer thereto, to the effect that the commitment is on its face void, for the reason that it does not set forth facts sufficient to warrant a conviction or judgment for contempt of court.

The commitment, after reciting the title of the court, is in the words as follows, to wit:

"On this day the Superior Court of the State of California in and for the City and County of San Francisco, being regularly in session, and having then and there regularly before it the actions and proceedings of the People vs. Eugene E. Schmitz and Abraham Ruef, and being then and there engaged in such actions and proceedings in the taking of testimony in open court while a witness, William J. Walsh, was upon the witness stand in open court and being regularly examined and interrogated in respect to said actions and proceedings, after the said William J. Walsh had been duly and regularly sworn to testify as a witness in said matter, and while he was so testifying in regard to his actions in the matter of serving an attachment for the body and person of one Abraham Ruef, which had theretofore on the 7th day of March, 1907, been regularly issued by said court and delivered to said William J. Walsh for execution as Coroner of the City and County of San Francisco, State of California, by reason of the fact that said court had theretofore duly made and entered its order, adjudging that Thomas F. O'Neil, the duly qualified, elected and acting Sheriff of said City and County of San Francisco was disqualified to act in said matter, and after said court had on several occasions admonished said Samuel M. Shortridge to take his seat and to refrain from interrupting the said proceedings, or from interfering with the due and orderly administration of justice, or the orderly administration of the procedure in said court, and the said Shortridge having refused to obey the orders and directions of said court, and having interrupted and continued to interrupt the orderly conduct of the proceedings before the said Court, and having interrupted and interfered with the due and orderly administration of justice in said court, the said court adjudged the said Shortridge guilty of contempt of court, and directed that the Sheriff of the City and County of San Francisco take the said Shortridge into

custody, and that he be confined for the period of twenty-four hours in the County Jail of the City and County of San Francisco, and the Court then found and now finds the following facts in relation to the said contempt, to wit: that on the 8th day of March, 1907, there was pending before the above-entitled court an action or proceeding entitled The People of the State of California, Plaintiff, vs. Eugene E. Schmitz and Abraham Ruef, Defendants; that the said court on said day duly and regularly met, and was during the time hereinafter mentioned duly and regularly holding a session of the said court; that in the matter of the said action and said proceeding the witness had been in said court at said time duly and regularly sworn, and was being examined and interrogated as such witness in said action on said day; that during the time of the examination of said witness the said Samuel M. Shortridge addressed the said court, interrupted the said proceedings, and was admonished and warned by the said court to take his seat and to cease his interruptions, and the said Samuel M. Shortridge refused then and there to obey the order and direction of the said Court; that the said Shortridge continued to talk to said court and interrupt the said proceedings, although directed by the said Court to cease to do so; and the conduct and acts and language of the said Shortridge were calculated to and they did interrupt the orderly conduct of the investigation and proceeding before said Court, and they did interfere with and interrupt the administration of justice in said court; that the conduct and the language of the said Shortridge were boisterous and offensive; that by reason thereof the said Shortridge was guilty of a contempt of court committed in the immediate presence of the court; and the court being fully advised in the premises;

"It is hereby ordered, adjudged and decreed that the said Shortridge be confined in the County jail of the City and County of San Francisco for the period of twenty-four hours; that the sheriff of the City and County of San Francisco take the said Shortridge into his custody and execute this sentence and order.

"Dated March 8, 1907.

"F. H. DUNNE,
"Judge of the Superior Court."

The law does not permit the petitioner to contradict the facts set forth in the order of commitment, but the recitals of the facts must be taken as true upon the hearing before this court on the proceedings for a discharge by the writ of *habeas corpus*.

Upon the other hand, no presumptions or intendments can be indulged in against the prisoner, but the facts set forth in the commitment must be sufficient to show contempt within the meaning of the law without the aid of intendments and presumptions.

"The power of the court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support." (*Batchelder v. Moore*, 42 Cal. 415.)

In *Overend v. Superior Court*, 131 Cal. 280, [63 Pac. 372], it was said: "In the case of a contempt committed in the presence of the Court, the section says that the order adjudicating the contempt must contain a recital of the facts. This provision can only mean that the order must contain a recital of those facts which make out a contempt, that is, a recital of those facts which, in a case of constructive contempt, the law says must be incorporated in an affidavit." In other words, the facts that prove the contempt, and not mere conclusions.

To the same effect are *People v. Turner*, 1 Cal. 155; *People v. Rowe*, 7 Cal. 183; *Ex parte Zeelandelaar*, 71 Cal. 238, [12 Pac. 259].

In *Ex parte Zeelandelaar*, the prisoner was discharged because the return did not show that a question that he had refused to answer as a witness was pertinent to the matter in issue before the court. In *Overend v. Superior Court*, 131 Cal. 280, [63 Pac. 372], an order adjudging a witness guilty of contempt was annulled on *certiorari* because the question which he had refused to answer was not set forth, and the order therefore did not show that he had refused to answer a pertinent question, for which reason the order did not state facts showing the accused to be guilty of contempt of court.

These two last-cited cases strikingly illustrate the doctrine that no presumptions or intendments can be indulged in to support an adjudication of contempt, and that the order of adjudication must state facts showing the prisoner to be guilty of contempt.

"The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused." (*Schwarz v. Superior Court*, 111 Cal. 106, [43 Pac. 580].)

With the foregoing principles in mind, we now proceed to an examination of the facts set forth in the commitment before us. The petitioner is an attorney at law, entitled to practice as such in all the courts of this state, and as such is an officer of all said courts. It is apparent from a reading of the commitment that the adjudication of contempt is not predicated upon the theory that the acts charged against him were committed by him as a mere interloper and stranger to the action then pending before the court. If that were so, it certainly should have been so stated in the order. Being an attorney at law, we think we should assume, in the absence of any statement to the contrary, that in addressing the court, as it is found that he did, he was acting as the attorney for one of the parties to the action then before the court. We do this the more readily because the argument before this court from both sides shows this to be the fact. A reading of the order of commitment discloses that the gravamen of the charge and finding against the petitioner is that, while a witness was being examined in the action then before the court, and after he had been admonished not to do so, he addressed the court and insisted on talking to the court. The finding is "that during the time of the examination of said witness the said Samuel M. Shortridge addressed the said court, interrupted the said proceedings, and was admonished and warned by the said court to take his seat and to cease his interruptions, and the said Samuel M. Shortridge refused then and there to obey the order and direction of the said court; that the said Shortridge continued to talk to said court and interrupt the said proceedings, although directed by the court to cease to do so." Evidently the statement that the petitioner interrupted the proceedings is based upon the fact that he addressed the court, for no other concrete fact is set forth.

The mere statement that he interrupted the proceedings without stating what he did does not comply with the plain mandate of the law that the facts must be stated. The statute requires that the court must make an order "reciting the facts as occurring in such immediate view and presence." This is essential, in order that it may clearly appear from the actual facts set forth that the accused has been guilty of a contempt. Every interruption of the proceedings of the court is not a contempt, nor unlawful, nor necessarily improper. Many interruptions are lawful and proper. Every time an attorney in the performance of his duty objects to a question asked a witness, or objects to any other proceeding in the action, he may be said to interrupt the proceedings. The particular circumstances of the interruption—the concrete facts constituting the interruption—must be set forth in order that the commitment shall show upon its face and without the aid of presumptions that the accused has been guilty of a contempt. The only interruption set forth—the only concrete fact set forth—is that, while a witness was being examined the petitioner addressed the court, and continued to do so after being admonished to take his seat. What he said to the court is not stated, and no circumstances are set forth which will enable us to say without the aid of intentment and presumption that his remarks were not perfectly proper in themselves, and strictly within the line of his duty as an officer of the court and the attorney for one or both of the parties to the action then pending before the court.

It is true that the court had directed him to cease addressing the court, but so had the court in the cases heretofore cited (*Overend v. Superior Court*, 131 Cal. 280, [63 Pac. 372]; *Ex parte Zeehandelaar*, 71 Cal. 238, [12 Pac. 259]; *Ex parte Rowe*, 7 Cal. 183) directed the accused as a witness to answer a question; yet it was held in those cases that the witness was not guilty of contempt unless the question was one pertinent to the issue before the court. Not only this, but the order of commitment must set forth the question and sufficient facts to affirmatively show that the question was one which the witness should answer. The reviewing court cannot, in such cases, in support of the action of the trial court, presume that the question which the witness refused to answer was pertinent and proper, but it must be shown to be so on the face of the commitment. Unless this be shown on the

face of the order, the commitment of the witness for contempt cannot be sustained, notwithstanding that the witness refused to obey the order of the court to answer the question. (See cases last cited.)

Examining the commitment now before us by the four corners in the light of the rule of law that no presumptions or intendments can be indulged in against the accused, it boils down to the proposition that the petitioner, an attorney for one of the parties to the action then pending before the court, has been adjudged guilty of contempt because he persisted in addressing the court as such attorney, presumably on behalf of his client. It is not suggested by anything in the commitment that the language employed by him was improper, or that it reflected in any manner upon the court or the judge thereof. It is true that the order does state in general terms that his conduct was boisterous and offensive, but reading this statement in connection with the context in which it occurs, it is clear that the order means no more by this than to state a conclusion from the fact that he persisted in addressing the court against the order of the court. So the question involves the single proposition: Does the simple fact that an attorney for a party to an action pending before the court, while a witness is being examined, persists in addressing the court, although admonished not to do so, constitute a contempt of court? We think it does not. For aught that we can see from the order, the petitioner may have been rightfully and respectfully discharging his duty to the court and to his client, making proper objections to the questions put to the witness on the stand. What he said to the court is not set forth, nor are any circumstances set forth making it improper for him to address the court in a respectful manner, except the bare order of the court not to do so. This we do not think is sufficient, any more than is the order to a witness to answer a question sufficient without an affirmative showing in the order of commitment that the question is one that the witness should answer.

In what we have said concerning the commitment, we have not overlooked the argument so forcibly pressed upon us by counsel for the respondent that the court has the right to refuse to hear counsel for a defendant who is a fugitive from justice, or who refuses to appear in court when lawfully required to do so.

Undoubtedly a defendant in a criminal case who is a fugitive from justice, or who refuses to submit himself to the jurisdiction of the court, has no right to be heard in court by counsel until he does submit himself to the jurisdiction of the court. (People v. Redinger, 55 Cal. 290, [36 Am. Rep. 32]; People v. Elkins, 122 Cal. 655, [68 Am. St. Rep. 73, 55 Pac. 599].) If the commitment in this case showed that the client of the petitioner was, at the time of the acts complained of, a fugitive from justice, and that the court for such reason had refused to permit him to address the court on behalf of such client, and that he nevertheless persisted in so doing, we should not hesitate to uphold the action of the court in adjudging him guilty of contempt for such action.

There is no statement in the order before us that defendant, or any party to the action then before the court, was a fugitive from justice, or was not then before the court. Neither is it stated that the court for any such reason denied petitioner the right to address the court. For aught that appears upon the face of the order of commitment the petitioner's client may have been sitting by his side in the courtroom. It is true that there is a recital in the order to the effect that an attachment had theretofore been issued for the body of Abraham Ruef; and from this we might infer, if it were permissible in this proceeding to indulge in presumptions against the accused, that Mr. Ruef may have been a fugitive from justice. But as we have already seen, upon proceedings to review an order committing a person for contempt, no intendments or presumptions may be indulged in against the accused, but the order must be strictly construed in favor of his liberty. (*Batchelder v. Moore*, 42 Cal. 415; *Schwarz v. Superior Court*, 131 Cal. 238, [12 Pac. 259].)

There is no statement in the record before us that Mr. Ruef was, at the time the petitioner addressed the court, or at any other time, a fugitive from justice. If such were the fact, and if for such reason the court had refused the petitioner the right to address the court, it was a very simple matter to so state in the order.

The power to punish for contempt, being an arbitrary power, and the facts as recited in the order of commitment being conclusive in such contempt proceeding, the correct rule, in our opinion, is to require the commitment to state the facts so that this court, on reading the commitment, can de-

termine as to whether or not such facts as a matter of law constitute a contempt of court. When we examine the commitment by the above rule we cannot say as matter of law that the petitioner was guilty of contempt.

For the reasons above set forth we think the order of commitment insufficient and that the petitioner should be discharged and it is so ordered.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 384. Second Appellate District.—April 12, 1907.]

JAMES D. REYMERT, Petitioner, v. B. N. SMITH, Superior Judge of Los Angeles County, Respondent.

CERTIORARI—COMMITMENT FOR CONTEMPT—CRIMINAL OFFENSE—CONSTRUCTION—REVIEW OF JURISDICTIONAL FACTS—PRESUMPTION.—

Contempt of court is a specific criminal offense; and the charge, finding and judgment of the court therein must be strictly construed in favor of the accused. The findings do not conclude a reviewing court from examining the record to determine the jurisdictional facts. Where the performance or taking of necessary steps which ought to appear of record is not shown, it will be presumed that such steps were not taken.

ID.—INSUFFICIENT RECORD—CONTEMPT OUT OF PRESENCE OF COURT—NOTICE OR SERVICE NOT SHOWN—WANT OF JURISDICTION.—Where the alleged contempt was committed out of the presence of the court or judge, no step essential to a proper accusation and plea in a criminal case should be omitted; and where there is nothing in the record to show that the petitioner was served with notice or an order to show cause indicating the charge of contempt, or that he was served with a copy of the affidavits, or given an opportunity to answer, and no answer or plea was filed, the court was without jurisdiction to make the order of commitment for contempt.

WRIT OF REVIEW to set aside proceedings upon commitment for contempt by the Superior Court of Los Angeles County. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

J. D. Reymert, *in pro. per.*, and J. Marion Brooks, for Petitioner.

J. D. Fredericks, District Attorney, and John C. North, Deputy District Attorney, for Respondent.

TAGGART, J.—Application for review of proceedings upon commitment for contempt by superior court of Los Angeles county.

Judgment was rendered by said superior court on March 16, 1907, adjudging that petitioner pay a fine of \$200, and in case such fine be not paid, that he be confined in the county jail of said county until the fine be satisfied at the rate of one day's imprisonment for each two dollars of fine. The fine not being paid, the defendant was committed to the custody of the sheriff of said county.

The original minute entry of the judgment made on the day of its rendition contained nothing to show of what the alleged contempt consisted; but subsequent to the issuance of the order of this court directing that the record of the proceedings in said matter be certified up to this court, and on the tenth day of April, 1907, an order was entered in the minutes of said superior court, stating that the judgment rendered by the superior court on March 16, 1907, "was not properly written out in the judgment record of this court," and ordering that the judgment entered be amended to conform to the judgment rendered. The latter order finds the allegations of the affidavits of certain persons (naming them) to be true and adjudges petitioner guilty of contempt for procuring false and perjured testimony.

There is nothing in the record brought up to show that the petitioner was served with any notice or order to show cause that indicated the character of the charge of contempt which the petitioner was expected to answer. It does not even appear that he was served with a copy of the affidavits upon which the proceeding was predicated. No answer of petitioner appears in the record and it does not appear that he was given an opportunity to answer. (Code Civ. Proc., sec. 1217.) The only instrument of any kind presented on his behalf was a motion to set aside the citation upon the ground that there was no proper complaint or information upon which to base it. This motion was overruled and the

court proceeded to hear the matter without any formal statement showing the charge that was made against the petitioner, and without any answer or plea being filed or entered or any issue of fact joined.

Contempt of court is a specific criminal offense (*Ex parte Gould*, 99 Cal. 362, [37 Am. Rep. 57, 33 Pac. 1112]; *Cosby v. Superior Court*, 110 Cal. 52, [42 Pac. 460]), and the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused. (*Schwartz v. Superior Court*, 111 Cal. 112, [43 Pac. 580].) The findings of the judgment do not conclude a reviewing court from an examination of the record to determine the jurisdictional facts. (*Blair v. Hamilton*, 32 Cal. 50.) While all natural and proper conclusions from the record will be indulged, where the performance or taking of necessary steps which ought to appear of record is not shown, it will be presumed that such steps were not taken. (5 Ency. of Pl. & Pr. 290.)

Waiving the question of the right of the court below to amend its records pending a proceeding for review in this court, it is apparent that the superior court failed to acquire jurisdiction of the person of the petitioner. The conviction of a citizen of a criminal offense without service on him of a formal statement of the charge against him and an opportunity to plead and answer such charge would be an anomaly in the law of criminal procedure. That a contempt proceeding is summary in its character is a reason why greater care should be taken in pursuing the steps required to reach a conviction, rather than a reason why certain steps necessary to the ordinary criminal proceeding should be omitted or overlooked.

Where an alleged contempt has been committed without the presence of the court or the judge at chambers, there is no step essential to a proper accusation and plea in an ordinary criminal case which can safely be omitted from the proceeding.

We are of opinion that the superior court was without jurisdiction to make the order made in this matter, and that an order of this court should be entered annulling said order and discharging said petitioner from custody, and it is so ordered.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 315. Second Appellate District.—April 13, 1907.]

LILLIAN H. PAGE, Appellant, v. **MARY A. GARVER**,
Respondent.

JUDGMENT—RES ADJUDICATA—MODE OF PROOF—COLLATERAL ATTACK—RECITALS OF JURISDICTIONAL FACTS—CERTIFIED COPIES OF JUDGMENT, FINDINGS AND PLEADINGS.—Where a judgment is offered as an estoppel, jurisdiction to render it must appear. The usual manner of proof of jurisdictional facts is to offer the judgment-roll; but where the attack upon a judgment rendered in the superior court is collateral, its recitals showing acquisition of the jurisdiction of the parties are evidence of the facts recited, and every intendment must be indulged in favor of the judgment. In such case, certified copies of the judgment, findings and pleadings are admissible to show what issues were concluded by the judgment, as against the parties and their privies, though unaccompanied by the judgment-roll.

ID.—JUDGMENT AGAINST INTESTATE—HEIRS AND WIDOW CONCLUDED.—A judgment binding upon an intestate is binding upon his heirs at law, and a judgment which would estop him in life would bar an action for the same cause by his widow, who stands in his shoes, after his death.

ID.—IDENTITY OF ISSUES—ACTION BY PRIVY IN ESTATE—ESTOPPEL BY FORMER JUDGMENT.—For the purpose of determining whether the issues determined by the former judgment are the same as those presented in an action by a privy in estate of the losing party, resort may be had to the pleadings and findings introduced in evidence in connection with the former judgment, and where it appears that the issues are the same, and that the same evidence would be required to support the former action which would be required in the one at bar, the plaintiff is estopped by the adjudication therein had.

APPEAL from a judgment of the Superior Court of Kings County, and from an order denying a motion for a new trial. **W. M. Conley**, Judge.

The facts are stated in the opinion of the court.

E. T. Cosper, for Appellant.

T. E. Clark, for Respondent.

SHAW, J.—Appeal on behalf of plaintiff from judgment and order denying her motion for a new trial.

The plaintiff, who is appellant here, is the widow of Samuel Page, deceased, who died intestate on June 24, 1899. Besides his widow, he left surviving him her unborn child *in esse*, who was born alive but died on the same day, and three sons and a daughter, the defendant herein, all children by a former marriage. Plaintiff, in her own right as widow and as sole heir of her deceased child, brings this suit to set aside and have declared null and void certain deeds, whereby the said Samuel Page, in his lifetime and long prior to his marriage to appellant, conveyed to defendant certain real estate described in the complaint, upon the ground that at the time of making the deeds Samuel Page was in a sick, weakened and exhausted condition, and, on account of great physical and mental weakness, incapable of making any deed, or doing any business whatever. That taking advantage of his condition, this defendant and her brother, Solomon C. Page, did, by means of fraudulent representations made to said Samuel Page, induce him to make and deliver to defendant the said deeds to the real estate. The answer contains no denial of the allegations as to the mental and physical condition of Samuel Page at the time of executing the deeds; nor any denial as to the fraudulent representations alleged to have been made by defendant. There is a denial that Samuel Page was, at the time of his death, the owner of the land in question, or that he had been, subsequent to May 1, 1897, the owner of any part thereof, or held any interest therein other than a life estate to a portion thereof. As a defense to the action defendant relies upon two judgments, which are pleaded by way of estoppel.

The conveyances from Samuel Page to the defendant were made on December 9 and 11, 1896, and the marriage of plaintiff to Samuel Page occurred on February 4, 1899. About one year after the conveyance of the property to defendant, Samuel Page commenced an action against her, having for its purpose the annulment and setting aside of the deeds whereby he had theretofore conveyed the real estate to the defendant. Pending the trial of this action Samuel Page died. A special administrator of his estate was substituted as plaintiff, who, under the order of the court, prosecuted said action to a final determination and judgment was rendered in favor of de-

fendant therein. At the time of filing the answer herein said judgment had become final. At the trial of this action defendant offered in evidence certified copies of the judgment, findings, complaint, amended complaint, and the order substituting the special administrator as plaintiff and his supplemental complaint in the former suit brought by Samuel Page; to all of which objections were made upon the ground that they did not constitute the entire record of the case. Other objections were made, which will be noticed in discussing the effect of the former action as an estoppel.

To constitute an estoppel the judgment pleaded in bar must be a valid judgment rendered by a court having jurisdiction, and these facts must be shown in order to justify the reception in evidence of such judgment. The usual and appropriate manner of making this proof is to offer the judgment-roll. Conceding, but not holding, this mode of proof to be exclusive where a direct attack is made upon a judgment (*McKinlay v. Tuttle*, 42 Cal. 570; *Wiggin v. Superior Court*, 68 Cal. 398, [9 Pac. 646]), we are nevertheless of the opinion that where a collateral attack is made the recitals contained in the judgment are sufficient evidence of the matters therein recited. The judgment may be grossly unjust or erroneous, but the decision of the court as to all issues involved in the action stands as a finality between the parties and their privies until set aside in some mode recognized by law. (Jones on Evidence, sec. 601.) In such case, where the judgment is one rendered by a court of general jurisdiction, the recitals contained therein constitute evidence of their truth and every intendment must be indulged in support of the judgment. (*Hahn v. Kelly*, 34 Cal. 391, [94 Am. Dec. 742]; *Estate of Twombly*, 120 Cal. 351, [52 Pac. 815]; *Drake v. Duvenick*, 45 Cal. 455.) The duly certified copy of the judgment pleaded and offered was the highest evidence of the adjudication by the court of the issues involved in the suit brought by Samuel Page against respondent; so its recitals showing acquisition of jurisdiction of the parties in that action constituted evidence of the facts recited. (*Simmons v. Threshour*, 118 Cal. 100, [50 Pac. 312]; Code Civ. Proc., sec. 1905.) We, therefore, conclude that the documents referred to were entitled to be received in evidence unaccompanied by the judgment-roll.

These two last-cited cases strikingly illustrate the doctrine that no presumptions or intendments can be indulged in to support an adjudication of contempt, and that the order of adjudication must state facts showing the prisoner to be guilty of contempt.

"The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused." (*Schwarz v. Superior Court*, 111 Cal. 106, [43 Pac. 580].)

With the foregoing principles in mind, we now proceed to an examination of the facts set forth in the commitment before us. The petitioner is an attorney at law, entitled to practice as such in all the courts of this state, and as such is an officer of all said courts. It is apparent from a reading of the commitment that the adjudication of contempt is not predicated upon the theory that the acts charged against him were committed by him as a mere interloper and stranger to the action then pending before the court. If that were so, it certainly should have been so stated in the order. Being an attorney at law, we think we should assume, in the absence of any statement to the contrary, that in addressing the court, as it is found that he did, he was acting as the attorney for one of the parties to the action then before the court. We do this the more readily because the argument before this court from both sides shows this to be the fact. A reading of the order of commitment discloses that the gravamen of the charge and finding against the petitioner is that, while a witness was being examined in the action then before the court, and after he had been admonished not to do so, he addressed the court and insisted on talking to the court. The finding is "that during the time of the examination of said witness the said Samuel M. Shortridge addressed the said court, interrupted the said proceedings, and was admonished and warned by the said court to take his seat and to cease his interruptions, and the said Samuel M. Shortridge refused then and there to obey the order and direction of the said court; that the said Shortridge continued to talk to said court and interrupt the said proceedings, although directed by the court to cease to do so." Evidently the statement that the petitioner interrupted the proceedings is based upon the fact that he addressed the court, for no other concrete fact is set forth.

The mere statement that he interrupted the proceedings without stating what he did does not comply with the plain mandate of the law that the facts must be stated. The statute requires that the court must make an order "reciting the facts as occurring in such immediate view and presence." This is essential, in order that it may clearly appear from the actual facts set forth that the accused has been guilty of a contempt. Every interruption of the proceedings of the court is not a contempt, nor unlawful, nor necessarily improper. Many interruptions are lawful and proper. Every time an attorney in the performance of his duty objects to a question asked a witness, or objects to any other proceeding in the action, he may be said to interrupt the proceedings. The particular circumstances of the interruption—the concrete facts constituting the interruption—must be set forth in order that the commitment shall show upon its face and without the aid of presumptions that the accused has been guilty of a contempt. The only interruption set forth—the only concrete fact set forth—is that, while a witness was being examined the petitioner addressed the court, and continued to do so after being admonished to take his seat. What he said to the court is not stated, and no circumstances are set forth which will enable us to say without the aid of intentment and presumption that his remarks were not perfectly proper in themselves, and strictly within the line of his duty as an officer of the court and the attorney for one or both of the parties to the action then pending before the court.

It is true that the court had directed him to cease addressing the court, but so had the court in the cases heretofore cited (*Overend v. Superior Court*, 131 Cal. 280, [63 Pac. 372]; *Ex parte Zeelandelaar*, 71 Cal. 238, [12 Pac. 259]; *Ex parte Rowe*, 7 Cal. 183) directed the accused as a witness to answer a question; yet it was held in those cases that the witness was not guilty of contempt unless the question was one pertinent to the issue before the court. Not only this, but the order of commitment must set forth the question and sufficient facts to affirmatively show that the question was one which the witness should answer. The reviewing court cannot, in such cases, in support of the action of the trial court, presume that the question which the witness refused to answer was pertinent and proper, but it must be shown to be so on the face of the commitment. Unless this be shown on the

[Civ. No. 292. Second Appellate District.—April 15, 1907.]

G. C. LINDOW, Appellant, v. C. COHN, Respondent.

PRINCIPAL AND AGENT—AUTHORITY OF TRAVELING SALESMAN—WARRANTY OF QUALITY OF GOODS—ADJUSTMENT OF BREACH ON SECOND ORDER.—Though a traveling salesman and soliciting agent has authority to bind his firm as principal by a warranty of the quality of goods sold under his order by the firm, he has no authority, after such goods have been sold and paid for, to determine a breach of warranty and adjust the breach by agreeing that the goods so sold may be retained, and their price deducted from a second order. His authority to sell is limited to a sale for cash only.

1D.—REMEDY FOR BREACH AGAINST PRINCIPAL.—The remedy for the breach of the warranty of quality by the agent is an action by the buyer to recover damages therefor against the principal whose goods were sold through the agent to the buyer.

1D.—ACTION UPON SECOND ORDER BY ASSIGNEE—FINDINGS AGAINST EVIDENCE—AUTHORITY—RATIFICATION.—In an action by an assignee upon the second order obtained by the agent which was filled by the principal, findings that the agent was authorized to receive the former goods in exchange, and that the principal ratified the adjustment of the breach of warranty by the agent, are held to be against the evidence.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Jellett & Meyerstein, and George E. Whitaker, for Appellant.

Emmons & Irwin, J. W. P. Laird, and Fred E. Borton, for Respondent.

SHAW, J.—The facts as they appear from the record are: That one Peiser, as traveling salesman and soliciting agent of Meyerstein Company, plaintiff's assignor, sold to defendant a lot of merchandise, consisting of corduroy trousers, and

on behalf of his principal made covenants of warranty as to the quality of the goods. Some six weeks after the goods had been received and paid for by defendant, Peiser again called upon defendant, soliciting further orders for his house, when defendant for the first time made complaint, stating that the corduroy trousers were not as he had represented them; that every pair thereof which defendant had sold had been brought back to him, and that he, defendant, had been compelled to reimburse the purchasers thereof. Whereupon Peiser admitted that the goods were not as warranted, and said to defendant that he wanted his trade, that he would do all that he could to make it right and told defendant to return the goods and charge his principal, the Meyerstein Company, with the goods shipped back, plus freight charges and the amount of defendant's loss in making adjustments with his customers. Defendant then gave Peiser an order on Meyerstein Company for the bill of goods, the purchase price of which is herein involved. The order was transmitted to Meyerstein Company, who in due course of time shipped the goods as per order. The defendant, pursuant to his agreement with Peiser, returned to Meyerstein Company the unsold portion of the first bill of goods, and after deducting the price of the goods so returned, together with freight charges and the amount which defendant had paid to his customers in making adjustments with them, sent to Meyerstein Company his check for the balance, in settlement of this last bill of goods. The Meyerstein Company refused absolutely to accept the return of the goods, and by letter stated: "We return you your check, shipping receipt and Wells, Fargo & Co. receipt. The goods that you shipped back will lay at the railroad at your expense, as we positively refuse to accept them." The assignee of Meyerstein Company thereupon brought suit for the amount of the last bill of goods, and judgment was rendered for defendant, from which and an order denying his motion for a new trial, the plaintiff appeals.

The court found that Peiser, as agent of Meyerstein Company, had authority to make the agreement for the return of the corduroy trousers and settle and allow the amount of ~~damages~~ claimed by defendant, as a condition of defendant giving the second order for goods, and found further that Meyerstein Company ratified the acts of its agent. There is nothing in the record disclosing the extent of Peiser's author-

ity, other than the fact that he was the traveling salesman of Meyerstein Company, engaged in soliciting orders for his house. It thus appears that no actual authority, as defined in section 2316, Civil Code, was conferred upon him to make this agreement. Hence, the only question, aside from the ratification found by the court, is whether or not the making of the agreement for the return of the goods to his principal was within the scope of his employment as traveling salesman or soliciting agent. Did the position clothe him with authority to make the said agreement with defendant, and, if not, did Meyerstein Company ratify his acts in that behalf? Peiser's authority to sell carried with it the authority to warrant the quality of the goods sold (Civ. Code, sec. 2323), and the court, upon sufficient evidence, finds that he did so warrant them. This section of the code, however, cannot be extended so as to clothe the agent with authority to determine, not only whether there was a breach of the covenants of warranty, but also to adjust and allow the damages which defendant claims to have sustained by such breach. Section 2325, Civil Code, provides that a general agent intrusted with the possession of goods sold may receive the price for which they are sold, but in this case the agent was not so intrusted. There is no evidence of custom, previous dealings, or evidence of any character, which tends to show that Peiser was held out by his principal as possessing other than the ordinary authority incident to the business of soliciting agent (Civ. Code, sec. 2337), and that was merely to solicit orders and transmit them to his principal. (*Chambers v. Short*, 79 Mo. 204.) His principal was not bound to complete the sale, but might, at its option, decline to fill the order. (6 Ency. of Law, p. 227.) In the absence of evidence to the contrary, "to sell" means to sell for cash, and an agent authorized to sell has no authority to receive other goods in part payment (*Organ Co. v. Starkey*, 59 N. H. 142); and in this case Peiser had no authority solely by virtue of his position to bind his principal upon an agreement to receive back a portion of the goods in the way of barter in payment for the second order. (*Clough v. Whitcomb*, 105 Mass. 484; Benjamin on Sales, p. 728; *Hayes v. Colby*, 65 N. H. 192, [18 Atl. 251]; *Seiple v. Irwin*, 30 Pa. St. 513.) Defendant had paid Meyerstein Company for the first bill of goods and the transaction was complete, and left defendant with his cause of action against the

principal for any breach of warranty made by the agent in the sale thereof.

We are, therefore, of the opinion that the evidence is insufficient to justify the findings to the effect that Peiser was authorized to make, on behalf of his principal, the covenants and agreement upon which respondent bases his defense.

The court finds that Meyerstein Company ratified and affirmed the acts of Peiser, and respondent contends that, even conceding that authority was lacking in Peiser to make the agreement, the ratification is sufficient to bind his principal. It is true that Meyerstein Company filled the second order and shipped the goods to defendant. But this in itself would not constitute a ratification on the part of the company, unless it had notice of Peiser's alleged agreement with defendant before making delivery of the goods. (Civ. Code, sec. 2310; *Lumber Co. v. Krug*, 89 Cal. 237, [26 Pac. 902]; *Owings v. Hull*, 9 Pet. (U. S.) 607.) There is no evidence tending to show that the company had any knowledge of the alleged agreement claimed to have been made with Peiser prior to such shipment, and it appears from the letter which defendant offered in evidence that it repudiated the agreement in the strongest possible language and returned to defendant his check. Such disavowal was sufficient. We cannot agree with respondent that Meyerstein Company received the goods that were returned. The contrary clearly and conclusively appears.

The judgment and order appealed from are reversed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 339. Second Appellate District.—April 15, 1907.]

JOSEPH BROWN, Appellant, v. HENRY WRIGHTMAN
et al., Respondents.

DEEDS—CONDITIONS—WAIVER OF FORFEITURE—GRANTS WITHOUT RESTRICTION.—A forfeiture provided for in a deed upon breach of conditions or restrictions against the carrying on of specified business thereon is waived by grants of adjoining portions of the tract by the same grantor, containing no conditions or restrictions.

APPEAL from a judgment of the Superior Court of San Bernardino County. Benjamin F. Bledsoe, Judge.

The facts are stated in the opinion of the court.

Byron Waters, and Henry Conner, for Appellant.

T. J. Norton, E. E. Milliken, and Gill & Denamore, for Respondents.

TAGGART, J.—Appeal from a judgment in favor of defendants. Appellant contends that the findings of fact made by the superior court entitle him to judgment against the defendants as prayed for in his complaint.

A summary of the findings of fact material here shows: That on the fourteenth day of December, 1886, plaintiff sold and conveyed to defendants' predecessors in title forty-five acres of land, adjoining the town of San Bernardino. The deed of conveyance contained the following condition: "This grant is made upon the following expressed condition subsequent, to-wit: That there shall never be conducted upon said premises or any part thereof the business of selling intoxicating liquors at retail, nor shall there ever be kept or maintained upon said premises or any part thereof any bawdy house, house of illfame or house of prostitution, and in case of the happening of either said events then this grant to cease and be void."

At the time of such sale and conveyance plaintiff owned and resided and still continues to reside, upon a tract of fifteen acres of land lying immediately west of said forty-five acre tract with only the width of a street intervening. At the time of said conveyance the district in which said two tracts of land were situated was a residential district and free from the business and houses of the character mentioned in the said condition. But in the years between 1891 and 1900 plaintiff sold portions of the tract of land so retained by him to various parties without restricting or limiting the use of the premises, and that said parties to whom the said portions were so conveyed established and maintained and continue to maintain thereon, with full knowledge, consent and acquiescence of plaintiff, houses of prostitution and places where intoxicating liquors are sold at retail. And plaintiff during said

years himself leased to persons conducting houses of prostitution and carrying on a retail liquor business houses located on said fifteen acre tract, understanding that they were to be used for such purposes. And said district in which both of said tracts of land were situate ceased to be a respectable residence neighborhood, and before the year 1902 became a district wholly devoted to places of lewd resort, houses of prostitution and retail liquor business, and that plaintiff directly, knowingly, and deliberately contributed to and acquiesced in such change.

On October 28, 1902, the defendant, the South San Bernardino Land and Improvement Company, sold four lots in said forty-five acre tract to defendant Miller, who erected thereon two cottages, which have been occupied since about January 1, 1903, by the two defendants, Bertha Smith and B. Flores, who have conducted bawdy-houses therein and used said houses as places of prostitution and for the sale of intoxicating liquors at retail.

Plaintiff brought this action to have the court declare a forfeiture of title to the forty-five acre tract under the condition above set out and for restitution of the possession of the premises.

The trial court held that plaintiff had waived his right to claim a forfeiture of any part of said lands, and that he was estopped by his own acts from complaining of the violation of the condition by his grantees or their successors in interest, by reason of the transactions and business heretofore or that may hereafter be done or performed in violation of said condition on the lots conveyed to Miller as aforesaid. The statement of facts found compels the conclusion reached by the trial court.

As a reason why the plaintiff should not be divested of his right to a forfeiture of the lands in question, appellant contends that his conduct with reference to other lands can have nothing to do with his right to the lands conveyed upon condition. The description of the two tracts as shown by the numbers of lots and blocks show them to consist of contiguous portions of the Rancho San Bernardino, and parcels of the same lands. But conceding them to have been held by different title, we are not aware of any rule which considers the place of the act constituting the waiver or estoppel if the act be such as to cause the result upon which the waiver or estoppel depends. No authority has been called to our at-

tention which would permit the plaintiff to render it impossible to fulfill the purpose for which the condition subsequent was placed in the deed, if the act by which this was accomplished were done on one side of the street, while he would not be permitted to do so if the act were done on the other side of the street. This attempted distinction "sticks in the bark."

The authorities cited by appellant declare the rule that forfeitures are not favored by the courts, and that conditions providing therefor are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture. (*Quatman v. McCray*, 128 Cal. 285, [60 Pac. 855]; see, also, *Reclamation Dist. v. Sels*, 145 Cal. 184, [78 Pac. 638].)

The waiver and estoppel found by the superior court are sustained by numerous cases. In *Duncan v. Central Pass. R. R. Co.*, 85 Ky. 525, [4 S. W. 231], the restrictions were inserted in the deed of plaintiff to the defendant to carry out a general plan of selling the property for residence purposes only. Subsequent sales of lots in the tract without such restrictions were held to constitute a waiver or abandonment. The court says: "A contract, the fulfillment of which becomes unreasonable, will not be enforced at the instance of a party who by his own conduct has produced such a result."

In *Jenks v. Pawlowski*, 98 Mich. 110, [39 Am. St. Rep. 522, 56 N. W. 1105], it is said: "Restrictions of this class are sustained upon the theory that a party has the right, in disposing of his property, to prevent such a use by the grantee as might diminish the value of the remaining land, or impair its eligibility for other uses. But is there no mutuality in such agreements? It certainly cannot be said that a grantor has the right afterward to sell an adjoining lot without restrictions, and thereby diminish the value of his former grantee's property and impair its eligibility for other uses, converting the locality into a saloon locality, and still be allowed to insist upon the restriction."

In *Chippewa v. Tremper*, 75 Mich. 36, [13 Am. St. Rep. 420, 42 N. W. 532], the restricting condition on which the forfeiture was asked applied only to the sale of intoxicating liquors. Held, that evidence of the sale of liquors by one of plaintiff's officers in a building erected upon an adjoining lot to that of defendant was admissible to show a waiver of

the condition by plaintiff, and, also, as tending to show an effort upon plaintiff's part to create a monopoly, and that a court of equity would not lend its aid to create a monopoly in selling poisons any more than it would in the selling of foods or other necessities.

These authorities appear to be directly applicable here and sustain the conclusions and judgment of the trial court.

The judgment affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 341. Second Appellate District.—April 15, 1907.]

Mrs. E. J. KELLER and HENRY KELLER, Appellants,
v. G. D. MCGILLIARD, Respondent.

ACTION TO QUIET TITLE—AFFIRMATIVE DEFENSE—FORMER JUDGMENT—

ESTOPPEL.—In an action to quiet title, where the court sustained an affirmative defense that defendant had obtained a former judgment quieting his title to the same property, under the same issues against one for whom the plaintiff in the present action who claims the property is a mere agent, the former judgment pleaded operates as an estoppel against the plaintiff, and the defendant's source of title is immaterial.

ID.—FAILURE OF EVIDENCE—TITLE NOT TO BE RELITIGATED.—The real plaintiff cannot relitigate the title to the property involved in the former judgment, notwithstanding he failed to show of what the title claimed by him consisted at the time of the former trial. If a party fails to assert his claim properly, or to present the proper evidence in the first suit, he will not be permitted to litigate it in a second suit.

ID.—UNNECESSARY CROSS-COMPLAINT—REFUSAL OF MOTION TO STRIKE OUT NOT PREJUDICIAL.—The refusal of the court to strike out an unnecessary cross-complaint, which presented no issues other than those presented by the complaint and answer, is without prejudice, where no judgment was rendered upon the cross-complaint, but only on an affirmative defense set up in the answer.

ID.—OFFICE OF CROSS-COMPLAINT.—A cross-complaint in an action to quiet title may be used to present a case for affirmative relief in order to preclude a dismissal of plaintiff's action and to compel a determination of the rights of the parties to the action.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Jones & Weller, for Appellants.

R. L. Horton, for Respondent.

TAGGART, J.—This is an action to quiet title. Judgment was in favor of defendant McGilliard. Plaintiffs appeal from judgment and order denying their motion for a new trial.

The complaint is in the usual form. The action was dismissed as to the defendants Campbell and McC. Chaffey, and the answer of the defendant McGilliard first denies the material allegations of the complaint and then sets up three affirmative defenses:

1. That the property described in the complaint was conveyed by the sheriff of Los Angeles county to one J. E. White by deed made pursuant to a judgment foreclosing a street assessment lien against Alex Scott and J. A. Frawley and others; that said White thereafter brought an action to quiet his title to said property against the said G. D. McGilliard, defendant herein; that notice of the pendency of said action was filed in the recorder's office as provided by law; and that by the judgment of the superior court duly given and made in said action on the seventeenth day of September, 1901, it was decreed that said G. D. McGilliard, defendant herein, was the true and lawful owner of said property, and that his title thereto be quieted against the claims of the said J. E. White, and said White estopped from setting up any claim to the property against the defendant herein. That an appeal was taken by said White to the supreme court, and said judgment was duly affirmed by that court on the sixteenth day of October, 1903. That the plaintiff E. J. Keller acquired her title to the property by quitclaim deed from said Alex. Scott and J. A. Frawley, dated May 7, 1902. That the issues involved in this case are the same as those involved in *White v. McGilliard*, and that plaintiff is the direct successor in interest to the alleged title of said Scott and Fraw-

ley acquired after the entry of the judgment in the action of *White v. McGilliard*.

2. A title by adverse possession based upon a certificate of sale of said property for payment of a delinquent bond for street assessment, made to him by the city treasurer of Los Angeles city on October 19, 1898, actual possession and payment of all taxes for more than five years prior to the commencement of the action being alleged; and

3. That the deed by which plaintiff acquired title is void and of no effect.

By the same instrument, and as part thereof, said defendant McGilliard sets out a cross-complaint in the form, and containing the usual allegations, of a complaint to quiet title to the property described in the original complaint against the plaintiffs and his codefendants.

On the day of trial and prior to the decision of the case defendant was permitted by the court to amend his answer by adding the allegation: "That the plaintiffs herein are closely related to the said J. E. White, the plaintiff in the case of *White v. McGilliard*, above mentioned, and are his agents and representatives, and that they have no interest in the property described herein, of any kind or character."

The court finds all the averments, allegations and denials of defendants' answer and cross-complaint to be true, but the defense of adverse possession and void deed; and that the allegations, averments and denials of plaintiffs' pleadings are untrue.

Appellants specify as grounds for reversing the judgment:

(1) That defendant did not set up in his answer his source of title, upon which the judgment was rendered; (2) error of the court in refusing to strike out the cross-complaint and in giving judgment thereon; and (3) insufficiency of the evidence to justify the court in finding that the treasurer's certificate of sale and deed passed the title to the defendant, and that the plaintiff was not the real party in interest.

To sustain their first point appellants assume that the only source of title pleaded by defendant was the city treasurer's certificate of sale and adverse possession. These were but parts of the same source of title set up in the second affirmative defense in the answer, and in no way support the judgment, since the trial court expressly found against this defense.

The assumption of appellants is unwarranted by the record. The first affirmative defense pleads as a source of title good against the plaintiffs, a decree of the superior court (affirmed by the supreme court) quieting defendant McGilliard's title to this same property, rendered in an action wherein the issues were the same as in this, against J. E. White, who is alleged to be the real plaintiff in this action. While perhaps not in the strict sense a source of title, these allegations constitute an estoppel which prevents J. E. White and his successors and agents from questioning the title of McGilliard and renders it unnecessary that he should as against their claims show his source of title. This defense appears to be the one upon which the judgment was rendered.

It is the rule that a cross-complaint is unnecessary in an action to quiet title, and where unnecessary it may be stricken out on motion, but the rule has its exceptions. (*Winter v. McMillan*, 87 Cal. 256, [22 Am. St. Rep. 243, 25 Pac. 407]; *Islais etc. v. Allen*, 132 Cal. 438, [64 Pac. 713].) There is no issue tendered by the cross-complaint here and none made by the answer to it which was not before the court on the complaint and answer. The judgment, however, was not rendered upon the cross-complaint. The findings of fact which support the judgment, and which are sufficient for that purpose, negative the allegations of the complaint and confirm the allegations of the first affirmative defense set forth in the answer. The references to the cross-complaint in the findings may be stricken out as surplusage and the findings still be sufficient to support the judgment. The so-called cross-complaint was not a separate pleading and its allegations were mere repetitions of some of the allegations of the answer. If the ruling on the motion were error, it was not prejudicial to plaintiffs' interests; but the practice here followed seems to be justified by the decision in *Islais v. Allen*, *supra*, in cases where affirmative relief is sought by the defendant to enable the latter to prevent a dismissal of the action by the plaintiff and thus compel a determination of the rights of the parties if the action be begun. In other words, the plaintiff in such an action, having laid claim to the defendants' property by suit, may be compelled, if the latter elects, to litigate in that suit the cloud thus raised upon defendant's title by the commencement of the action.

Appellants' third ground of reversal, like the first, proceeds upon the assumption that the treasurer's certificate of sale is the only source of title pleaded by the defendant. The trial court was of the opinion that there was not sufficient evidence to justify it in finding that this certificate and the deed made in pursuance thereof passed title to the defendant, even when aided by the evidence of adverse possession introduced, and there is nothing in the record to suggest that the judgment rests upon these instruments, or either of them, alone. If the introduction of the deed were erroneous it could not have been prejudicial.

The plaintiffs' confused and conflicting testimony on the witness-stand, taken with the record evidence in the case, was sufficient to justify the trial court in finding that she was the mere agent of J. E. White in this action. The matters to be considered in drawing this inference are peculiarly within the province and discretion of the trial court, who had the witness before it, and could best determine the true relations of the parties. For the purposes of this appeal, this finding of the trial court must be accepted and J. E. White regarded as the real plaintiff here.

The real plaintiff then stands in the position of attempting to relitigate or again litigate title to the same property and against the same parties who were before the court in *White v. McGilliard*, 140 Cal. 654, [74 Pac. 298]. From the opinion of the supreme court in that case it appears that plaintiff in that action (the real plaintiff here) to sustain his claim of ownership of the property relied upon the same title conveyed by deed of one A. K. Crawford to Alex. Scott and J. A. Frawley, which was introduced to support the title of Mrs. Keller, the record plaintiff here, and also upon the deed which White received from the sheriff in pursuance of the execution of the judgment foreclosing the street assessment lien in the action of *White v. Scott, Frawley et al.* In the absence of other evidence than these instruments and proceedings the court found that they were "not in themselves sufficient to connect appellant with any paramount title to the premises."

The court upon the trial of that case (140 Cal. 654, [74 Pac. 298]) considered these evidences of title and presumably found that all the title originally held by Crawford was vested in J. E. White, but since it did not appear that Crawford had any title at all, White's claim of ownership failed against

defendants' possession because the burden was upon him to establish a paramount title. Had he supplied in that action the chain of title with which he now supports the title in Mrs. Keller's name, his whole title would have been passed upon by the court. The purchase from Scott and Frawley in the name of Mrs. Keller does not bring to plaintiffs' support any other or different title than that presented on the trial of the other cause. All the title of Scott and Frawley and of A. K. Crawford was before the court, but plaintiff in that action failed to show of what this title consisted. Failing to do this, he cannot now maintain another action against the same parties for the purpose of introducing evidence to show what title Scott and Frawley had at the time of the former trial. It is a well-settled rule that if a party fails to assert his claims properly, or to present the proper evidence in the first suit, he will not be permitted to litigate it in a second suit. (*Bingham v. Kearney*, 136 Cal. 177, [68 Pac. 597].)

The errors of law complained of as arising during the course of the trial, in so far as they are not covered by the foregoing consideration of the case, are not specially urged. They do not appear to present any error prejudicial to appellant.

Judgment and order appealed from affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 336. Second Appellate District.—April 16, 1907.]

MARGARET CORDINER, a Minor, by Her Guardian ad Litem, Respondent, v. LOS ANGELES TRACTION COMPANY, and LOS ANGELES RAILWAY COMPANY, Appellants.

NEGLIGENCE—FUTURE DAMAGES RESULTING FROM INJURY—EXPERT EVIDENCE OF PHYSICIANS.—In an action for an injury resulting from negligence in order to justify a recovery for future consequences, the evidence must show with reasonable certainty that such consequence will follow. Where the injury was to the base of the brain, the testimony of experienced physicians is admissible

to show that with reasonable certainty future evil consequences will result from the injury.

ID.—COLLISION—CONCURRING NEGLIGENCE OF RAILWAY COMPANIES—RULE OF "LAST CLEAR OPPORTUNITY" INAPPLICABLE.—Where the plaintiff was injured by a collision resulting from the concurring negligence of two street railway companies, the plaintiff may recover against either or both of them, and the rule of "the last clear opportunity to avoid the injury" is inapplicable, there being no contributory negligence of the plaintiff. In such case, the plaintiff, while in pursuit of her rights against both defendants, cannot be involved in a litigation to determine the respective rights of the defendants as against each other.

APPEALS from orders of the Superior Court of Los Angeles County, denying motions for a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Harris & Harris, and Byron L. Oliver, for Los Angeles Traction Company, Appellant.

Bicknell, Gibson, Trask, Dunn & Crutcher, and Norman S. Sterry, for Los Angeles Railway Company, Appellant.

Hunsaker & Britt, for Respondent.

SHAW, J.—This is an action to recover damages for personal injuries sustained by plaintiff while lawfully riding on a street-car operated by the Los Angeles Traction Company, one of the defendants.

The Los Angeles Traction Company owned a street-car line on Sixteenth street, in Los Angeles, over which it was running its cars in carrying passengers; the Los Angeles Railway Company owned and operated a street-car line on Grand avenue, in said city.

On January 31, 1903, a collision occurred at the intersection of West Sixteenth street and South Grand avenue between the car of the Los Angeles Traction Company, on which plaintiff was a westbound passenger on said Sixteenth street, and a north-bound car of defendant Los Angeles Railway Company on said Grand avenue, which collision, it is charged, was due to the negligence and want of care of the servants

of said defendants, and wherein, as a result of said collision, plaintiff was violently thrown from the car of the Los Angeles Traction Company, on which she was riding as a passenger, by reason whereof she sustained injuries, for which, upon the trial, she had judgment against defendants for damages in the sum of \$5,000. Both defendants appeal from orders of the court denying their motions for a new trial. Defendants ask for a reversal, first, upon the ground of error in the admission of testimony of medical experts as to future consequences of the injury; second, in the refusal of the court to give certain instructions requested by defendant Los Angeles Railway Company.

Appellants concede plaintiff's right to recover, but contend that the amount of recovery should be limited to the loss that she was "reasonably certain" to sustain. We are in full accord with counsel's view of the law, which appears to have been embodied in an instruction, number VI, given to the jury by the trial court, wherein they were instructed: "In case you find for the plaintiff you can allow plaintiff as damages only fair and reasonable compensation for such harm or damage as flows naturally from the injury complained of, and as a natural result of the injury; and the evidence must show to a reasonable certainty, that such harm or damage has or does exist, or will result, before you can allow compensation therefor. No damages can be allowed that are merely conjectural, or flow from sympathy."

No attack is made upon this instruction, but counsel contend that the evidence of the physicians who testified as experts, over objections made by appellants, was of a character from which no certainty could be deduced, and that the testimony consisted of mere speculation and conjecture as to possible future consequences of the injury, which was calculated to, and did, influence the minds of the jury, and resulted in their rendering a verdict for a sum unsupported by the evidence, except upon the theory that plaintiff would at some future time be subjected to the conditions which might follow as a result of the injury sustained.

The evidence tended to show that plaintiff had sustained a fracture at the base of the brain, and referring to this fact and other conditions shown to exist Dr. Dukeman, a witness on behalf of plaintiff, was asked: "Would there be any danger of a relapse on the part of the patient after a consider-

able period of time during which the patient had apparently made a complete recovery?" To which he answered: "There is some danger." And in reply to, "What is the occasion of the danger?" stated: "After a fracture there is always more or less thickening due to the reparative processes that go on in the recovery of a fracture. That thickening may produce pressure on the brain and produce various symptoms. . . . One of the main symptoms may be convulsions; may be paralysis of some form."

Referring to his answers in regard to the probability of future trouble, the witness said there would be danger of a recurrence of such symptoms as he had indicated for a period of days, weeks, months, or years. On cross-examination, the witness further stated: "I should look for more serious and fatal results from a fracture at the base of the brain than at any other place. I should look for this after apparent recovery, apparent recovery so far as anybody can tell; I would always be looking for something. . . . The doctor is frequently mistaken in the diagnosis of a case. I think he is more often correct than incorrect. . . . In the majority of cases I would look for future trouble. I can't tell what will happen in this case. My experience and knowledge as a physician has taught me that in a majority of cases of this kind, where there has been, to even the eye of a doctor, a complete recovery, convulsions or paralysis, or some other symptoms, various symptoms, would happen. I should look for convulsions in the majority of cases of that kind where there had been a complete recovery, to the eye even of a doctor."

Dr. H. G. Brainard, another physician called as a witness on behalf of plaintiff, and having reference to the condition of plaintiff after an apparent recovery, was asked: "What results are still likely, or what injury is a patient still likely to experience as a result of the injuries received?" and replied: "The condition would show that the patient had not thoroughly recovered from the effect of the injury, and we might expect from the injury the symptoms that rise frequently from a case of suffering from a fracture at the base of the brain. There is danger of convulsions or epilepsy, danger of mental deterioration, danger of paralysis."

To justify a recovery for future consequences the evidence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the

disability indicated may follow, or is likely to or will probably follow as a result of the injury, will not warrant a verdict for damages. This, however, does not mean that the testimony of a witness should be excluded unless he is reasonably certain that the indicated results will follow, nor that isolated portions of his testimony should, standing alone, or considered with other evidence, extend to the degree of strength required to establish reasonable certainty as to future resulting consequences. It is the province of the jury to weigh and determine its value as proof. The evidence here tended, in an appreciable degree, to prove the ultimate fact; that is, the reasonable certainty that future evil consequences would result from the injury, and was properly admitted for the consideration of the jury—it being its function, upon a consideration of the evidence as a whole, to determine its sufficiency as proof of the ultimate fact. Its competency should not be confounded with its sufficiency; nor should the technical definition of words constitute a controlling factor in determining the question of admissibility. But, as stated in *Ballard v. Kansas City*, 110 Mo. App. 391, [86 S. W. 479], “the main object is not to draw fine distinctions based upon accurate definitions of words, but to ascertain the real idea expressed.” (See, also, *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, [46 Am. St. Rep. 849, 61 N. W. 1101].) It is often impossible to show by positive proof whether or not an impairment of health or faculties will follow as a result of injury. Hence, of necessity, in determining the question courts and juries must rely upon the testimony of properly qualified physicians for such testimony as will in the minds of the jury establish the fact in issue to a reasonable certainty. Such evidence must be clearly distinguished from conjecture, or that which merely establishes a possibility of future trouble. As a rule, the physician whose opinion is most reliable is loath to give an opinion as to what consequences will or will not follow as a result of an injury in a certain case, but at the same time willing, as here, to state the result of his own professional experience and observations in treating cases where like injuries have occurred, and as a result of that experience say that we might or might not expect like results to follow in this case. Testimony of duly qualified experts which shows that in a majority of cases where the injury consists of a fracture at the base of the brain, such injury results in future epilepsy,

paralysis, or mental deterioration, tends to prove the reasonable certainty that such consequences will follow in any given case of like injury.

In this view considered, the evidence, while it may not have been by the jury considered sufficient proof, nevertheless tended to establish to a reasonable certainty that, notwithstanding the apparent recovery of the plaintiff, she would in the future suffer from the effects of the injury.

Dr. Dukeman testified that there was some danger of a relapse, and gave his reasons for so stating. That after apparent recovery he should look for serious results; that in the majority of such cases he would look for future trouble; that in a majority of such cases where there was an apparent complete recovery to the eye of a doctor, convulsions, paralysis, or other conditions of disease, followed as a result of the injury; that he should look for convulsions in a majority of such cases.

Dr. Brainard testified that epilepsy and mental deterioration might be *expected* to follow (not that they *might* follow), and that there was danger of such conditions.

In *Peterson v. Chicago etc. Ry. Co.*, 38 Minn. 511, [39 N. W. 485], and *Nichols v. Brabazon*, 94 Wis. 549, [69 N. W. 342], the court held that questions which called for the opinion of the witness as to the probability of the patient recovering were not subject to the objection made here, the court in the latter case observing: "Certainly, the effect of the whole testimony must be to establish a reasonable certainty that the effects of the injury will be suffered in the future."

In *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, [46 Am. St. Rep. 849, 61 N. W. 1101], a question asked as to the reasonable probability of the ultimate recovery was sustained, the court saying: "While it is true that the whole testimony must establish, in the minds of the jury, more than a mere 'reasonable probability,' and must amount to proof to a 'reasonable certainty,' this ultimate fact is susceptible of proof by items of testimony which do not, separately, fully establish it." (*Mitchell v. Tacoma Ry. & M. Co.*, 13 Wash. 560, [43 Pac. 528]; *Ballard v. Kansas City*, 110 Mo. App. 391, [86 S. W. 479]; *Peterson v. Chicago etc. Ry. Co.*, 38 Minn. 511, [39 N. W. 485]; *Filer v. New York Cent. Ry. Co.*, 49 N. Y. 42; *Hallum v. Village of Omro*, 122 Wis. 337, [99 N. W. 1051].)

We have carefully examined the great number of authorities submitted by counsel for appellants. Many of them relate to the form of instructions given for the guidance of the jury where damages for future results of injuries were sought. Others are clearly distinguishable from the case at bar. In *Lenta v. Dallas*, 96 Tex. 258, [72 S. W. 59], an objection was sustained to an abstract question upon the ground that it was not confined to the probable effects of the injury. *Yaeger v. Ry. Co.*, [Cal.] 51 Pac. 190, falls within the same rule. The case of *Strohm v. R. R. Co.*, 96 N. Y. 305, has been frequently cited in support of the proposition that consequences which are contingent, speculative or merely possible are not proper to be considered in ascertaining the amount of damages sustained by reason of personal injuries. In that case the court recognizes the rule that "to entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." In the *Strohm* case the questions and answers upon which the court based its ruling were: "You said it (the injury) might develop into worse signs or conditions? What do you refer to?" To which the witness answered: "A patient . . . *may* develop," etc. Both question and answer related to what conditions *might* develop, not to conditions that might be *expected* to develop, as a result.

Neither of the defendants questioned the right of plaintiff to recover such damages as she had sustained in the collision, but each contended that the other should be held responsible therefor, and with the view of having the jury pass upon the question, the Los Angeles Railway Company asked the court to instruct the jury, in effect, that notwithstanding the negligence of its motorman in driving his car upon the crossing, still if the traction motorman could, after he saw that it was beyond the power of the motorman of the Los Angeles Railway car to avoid the accident, have, by proper care, prevented the collision, then in the negligence of the defendant Los Angeles Traction Company was the proximate cause of the injury. In other words, while admitting that plaintiff's injury resulted from the collision due to the joint or concurrent acts of negligence of defendants, she must be confined in her recovery for such damages to a judgment rendered

against the defendant who had the "last clear chance" to avoid the collision and neglected to act upon it. Appellant seeks to apply the well-established principle that "he who last has a clear opportunity of avoiding the accident, by the exercise of proper care to avoid injuring another, must do so." (*Esrey v. Southern Pacific Co.*, 103 Cal. 541, [37 Pac. 500].) This rule is only applicable to cases where the defense is based upon the contributory negligence of plaintiff due to his want of care in placing himself in a position of danger, and where he may, notwithstanding his negligence, recover from a defendant, who by the exercise of proper care could have avoided the injury. We are unable to perceive why this rule should apply to plaintiff, who was in no way chargeable, by imputation or otherwise, with negligence; nor are we referred to any authority which supports the proposition. Indeed, all the authorities recognize the right of recovery against either or both of the defendants whose concurring acts of negligence united in producing the injury. (1 Shearman and Redfield on Negligence, p. 122; 1 Thompson on Negligence, p. 75; *Doeg v. Cook*, 126 Cal. 213, [77 Am. St. Rep. 171, 58 Pac. 707]; *Tompkins v. Clay St. Ry. Co.*, 66 Cal. 163, [4 Pac. 1165]; *Pastene v. Adams*, 49 Cal. 87.)

Plaintiff, having a right to recover against either or both defendants, could not, while in pursuit of her rights, be involved in a litigation having for its purpose the determination of questions involving the respective rights of defendants as against each other.

It follows that the orders appealed from must be affirmed, and it is so ordered.

Allen, P. J., and Taggart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 16, 1907, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 13, 1907.

[Civ. No. 281. First Appellate District.—April 18, 1907.]

SAN FRANCISCO NATIONAL BANK, Respondent, v.
AMERICAN NATIONAL BANK OF LOS ANGELES,
Appellant.

BANKS—CUSTOM AS TO COLLECTION OF PAPER—KNOWLEDGE IMPUTED TO DEPOSITOR—CONTRACT OF AGENCY.—A reasonable custom of all the banks of a place that none of them shall be liable for commercial paper deposited with any one of them for collection elsewhere, until the proceeds thereof in actual money shall come to their possession, must be conclusively deemed known to the depositor, and to be binding upon him as an implied condition of the contract of agency, without reference to his knowledge or want of knowledge of the custom.

ID.—DRAFT FORWARDED FOR COLLECTION—FAILURE OF COLLECTING BANK—LOSS OF DRAWING BANK.—Where such a custom existed in the banks of San Francisco and Los Angeles, and a bank of the former city sent a draft to a bank of the latter for collection in Arizona, and the collecting bank in Arizona failed after collection, the loss must fall upon the San Francisco bank, which drew the draft.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thos. F. Graham, Judge.

The facts are stated in the opinion of the court.

Lynn Helm, for Appellant.

S. C. Denson, for Respondent.

KERRIGAN, J.—The plaintiff placed a draft with the defendant for collection, the defendant forwarded the draft to a bank at Arizona for collection, which bank collected the draft, failed, and no part of the proceeds has ever reached any of the parties hereto. The action was tried by the court on an agreed statement of facts; judgment was rendered therein for plaintiff, from which judgment the defendant appeals.

The agreed statement of facts, in part, is as follows: The Judson Dynamite and Powder Company, of San Francisco, held a check, dated December 17, 1903, on the Sandoval Na-

tional Bank of Nogales, Arizona, for the sum of \$637.97, which check was, December 21, 1903, by the powder company, indorsed to the San Francisco National Bank, and deposited with it for collection. The same day that bank indorsed the check to "any bank or banker," and sent it to the American National Bank of Los Angeles "for collection and return." The American Bank of Los Angeles received the check December 22, 1903. It thereupon examined a directory of banks and bankers, and learned that there were two banks at Nogales, one the bank on which the check was drawn, and the other the International Bank of Nogales, whereupon it indorsed the check "American National Bank of Los Angeles, to any bank or banker," and forwarded it to the International Bank of Nogales for collection, by which bank it was received and collected in cash December 28, 1903. On the same day the International Bank of Nogales sent the American National Bank of Los Angeles a draft for \$636.72, drawn on the National Bank of Commerce of New York, which was received in due course of mail and immediately forwarded by the Los Angeles Bank to the Corn Exchange Bank in New York for collection, by which bank it was received January 7, 1904, and the next day presented to the National Bank of Commerce for payment. Payment was refused because of insufficient funds, and the draft was duly protested for nonpayment. The International Bank of Nogales failed January 15, 1904, and was utterly insolvent. In the meantime, on January 8, 1904, the Corn Exchange Bank of New York telegraphed the defendant of the nonpayment of the draft and that the draft had gone to protest, and thereupon, on the same day, defendant telegraphed to the International Bank of Nogales as follows: "Your draft of December 28 on National Bank of Commerce for six hundred thirty-six is protested. Protect and wire the money to pay." In response the International Bank of Nogales telegraphed the defendant: "Draft protested for reason that currency remittance to our New York correspondent went astray. We follow your instructions and cover same by wire."

January 15, 1904, the defendant telegraphed the National Bank of Commerce that the protested draft was being returned for collection, that the International Bank had wired funds covering said draft, and requested the National Bank of Commerce to hold the amount for return of draft to it. On

the same day the National Bank of Commerce replied that the account was not good for the check mentioned, and that it could not meet the request of the defendant. The defendant wrote to the plaintiff January 14, 1904, and as the contents of that communication are sufficiently referred to in the reply thereto, dated January 19, 1904, only the reply need be given. It is:

"We are in receipt of your favor of the 14th inst., confirming your telegram of even date, and note your suggestion in regard to charging back item of \$637.97, on Sandoval National Bank of Nogales, and replying to same have referred the matter to our client, and he wired to the maker of the check, in Nogales, and has reply to-day stating that the check was paid, and that the money was in the hands of your agent at Nogales. Our client therefore declines to reimburse us in the matter, and inasmuch as we cannot return to them the original check, we are inclined to think that they are right, and that at the time the check was paid to your agent our responsibility in the matter ceased. Is this not correct?"

It is the custom of banks in each of the cities of San Francisco and Los Angeles, by recommendation of their several clearing-houses, that in receiving notes, drafts and checks on points other than said respective cities of San Francisco and Los Angeles, either for collection or credit, that the bank with which said check is deposited for collection shall transmit the same in the usual manner for collection, either to the bank on which it is drawn, or to such bank or persons as it may deem reliable, with the express understanding that the same is done simply for account and convenience of the depositor, and that the bank so receiving said item for collection shall in no wise be liable for default of any such bank, person or agents, or for loss in transit, or for any other cause whatever until the proceeds in actual money shall come into its possession.

There is a great diversity and conflict of opinion on the question mainly discussed in the briefs, namely, what is the extent of the duty and responsibility of a bank which receives an instrument for collection at a place different from its place of business, and how far it is liable for the acts of its correspondents or agents in the performance of their duty. One class of cases maintains the absolute liability of a bank for any default or neglect of its correspondent or collection

agent in the same manner as it would for the default of its own employees, regarding the correspondent or collector as the agent of the bank, and not the agent of the owner of the commercial paper. Another class of cases holds the bank receiving the claim for collection at a place distant from the place where it conducts its business liable only for failure to exercise due care and diligence in selecting a trustworthy agent or correspondent, and if it exercise such care and diligence the bank is exonerated from all liability. The view, however, we have reached in the case on other points renders it unnecessary to analyze and discuss the various conflicting decisions on this question.

1. The trial court held that the defendant was guilty of negligence in accepting and forwarding for collection the draft on New York sent it by the International Bank of Nogales; that it should have insisted upon payment of the money. In reaching this conclusion the court doubtless relied upon the general principle of law that as commercial paper is payable in money only, a collecting bank is not authorized to receive in payment anything but money (Selover on Bank Collections, secs. 46, 47), but defendant did not take the New York draft as payment. At the time of receiving the draft on New York the defendant might have sent it back to the International Bank of Nogales, and demanded payment of the money, or it might have pursued some other course than the one it did adopt, but no fair inference can be drawn from the statement of facts that any other method might with reasonable probability have resulted in a collection from the International Bank of Nogales. There are respectable authorities which hold that it is the custom of banks to remit by check or draft or certificate for the proceeds of any collection, instead of remitting the exact money collected, and that this custom is so general and universal that courts take judicial notice of it (Selover on Bank Collections, sec. 127, and cases cited), but we do not rest our decision on this line of authorities. We take the position that there is nothing in the record which would warrant the conclusion that the defendant was remiss in any duty or obligation it owed the plaintiff. By the custom before referred to the Judson Dynamite and Powder Company, when it deposited the draft with plaintiff for collection, authorized the plaintiff to transmit the same through the usual channels for such collection. It was not expected

that the plaintiff would send a messenger from San Francisco to Nogales for the purpose of collecting the draft. Under the custom plaintiff only undertook to transmit the draft, through the usual channels, either to the bank on which it was drawn, or to such bank as it might deem reliable, with the one understanding that the same was done simply for account and convenience of the Judson Dynamite and Powder Company, and that it should not be responsible for the default of any such bank, or for any cause whatever, until the proceeds in actual money should come into its possession. The plaintiff transmitted the draft to the American National Bank of Los Angeles, a bank which it deemed reliable. It was not guilty of any negligence in making such selection of the Los Angeles bank, and is not liable to the Judson Powder Company for any default of such bank. The money never came into the hands of the plaintiff. The same may be said as to the deposit of the draft by the plaintiff with the Los Angeles bank for collection. The Los Angeles bank sent the draft to the International Bank of Nogales, in the usual manner, and was guilty of no negligence in selecting the International Bank as its agent at Nogales. The Los Angeles bank never received the money, and the proceeds of the draft never came into its possession. When the International Bank of Nogales collected the money it collected it under the custom as agent for the Judson Dynamite and Powder Company, it having been selected through the agencies of which the plaintiff availed itself, and which the powder company impliedly agreed to when it left the draft with plaintiff for collection. From the time the International Bank of Nogales collected the money, it became the debtor of the Judson Dynamite and Powder Company. It appropriated the money and has not paid the powder company. It would not be in accord with the custom to hold the defendant for the default of an agent not in its employ, and of whose services it availed itself with no fault or negligence in the selection.

2. At the time the plaintiff bank sent the draft in question to the defendant bank at Los Angeles for collection, there was a custom among banks of that city to which reference has already been made. That part of it pertinent here in substance absolved the banks at Los Angeles from default of their correspondents in collecting checks or drafts at other points than Los Angeles.

While the identical custom prevailed in San Francisco as in Los Angeles, there is nothing in the agreed statement of facts from which we can conclude that the plaintiff knew of the existence of the custom in Los Angeles. Knowledge of a custom must, according to some decisions, be brought home to parties who are bound by it; but the better authorities declare that the custom of banks of a place is binding on parties who deal with a bank there, whether they are aware of its existence or not. In *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, [39 S. W. 338], it is said: "A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made without regard to his knowledge or want of knowledge of its existence." In *Sallien v. Bank of Roanoke*, 90 Tenn. 221, [16 S. W. 374], it is held that the great weight of authority is that a reasonable custom of all the banks of a place, though not known to a party sending paper for collection to one of them, is binding upon the sender as a part of the contract of agency, to which the sender impliedly assents by selecting the bank without inquiry or without especial instructions.

Selover on Bank Collections, section 10, says: "Where the custom is general and reasonable, the depositor of paper for collection is bound thereby, though he did not know of it."

In Morse on Banks and Banking (section 231) it is said: "Knowledge of the usage, either express or implied, must, it has been said, be brought home to the parties who are to be bound by it. (*Mills v. Bank of United States*, 11 Wheat. 431; *Peirce v. Butler*, 14 Mass. 303.) But other cases of high authority declare that the usage of the bank in collections will bind the person dealing with it in this business, whether such usage be known to him or not (*Smith v. Whiting*, 12 Mass. 6, [7 Am. Dec. 25]; *Bank of Washington v. Triplett*, 1 Pet. 25; *Dorchester & Milton Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 472, [31 S. W. 38]; *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, [39 S. W. 339]); and this is certainly the correct rule. Indeed, the opposing cases can be easily reconciled by the link which appears to be suggested in one of them. The facts that one deals with a bank

without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that, if a person hands over a note to a bank for collection without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course, and to retain him until the whole theory has been expounded to him, when his conduct unmistakably shows that either he already knows it or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank, at his own deliberately assumed risk of its sufficiency. In such case the bank not only has the right to assume, but it is even positively bound to assume, that his desire is that the ordinary and established usage be pursued. And an unordered deviation from that usage, though the usage were unknown to him, would lay the bank open to his suit for damages; and the court must, as has been already shown, hold as matter of law that the pursuance of this custom was an implied condition of the contract. It is clear, then, that he could not plead ignorance of it in order to lay a foundation for a suit against the bank for acting according to it. The knowledge on his part would be implied conclusively." (See, also, *Id.*, sec. 9.) This is the rule in California. (See *Davis v. First Nat. Bank of Fresno*, 118 Cal. 600, [50 Pac. 666].)

A custom must be general as to place and not confined to any particular bank or banks. (Selover on Bank Collections, sec. 10.) The custom under discussion was general as to Los Angeles; it was reasonable, and under the authorities cited the plaintiff was bound by it.

The judgment is reversed.

Cooper, P. J., and Hall, J., concurred.

[Civ. No. 349. First Appellate District.—April 18, 1907.]

ROBERT W. HARRISON, Appellant, v. S. W. HORTON,
Auditor, etc., Respondent.

SAN FRANCISCO CHARTER—ASSISTANT DISTRICT ATTORNEY—ORDINANCE PROVIDING ADDITIONAL ASSISTANT—SALARY—MANDAMUS.—An ordinance of the city and county of San Francisco, duly passed, providing for the appointment of an additional assistant district attorney to those authorized by the charter, makes him a legal assistant or deputy district attorney, and the appointment is of the same dignity as if the ordinance had been embodied in the charter; and *mandamus* will lie to compel the auditor to draw a warrant for his salary payable out of the general fund, as fixed in the ordinance.

Id.—CONSTRUCTION OF CHARTER—SPECIFIC APPROPRIATION—SALARY OF OFFICER.—The provision of the San Francisco charter forbidding the auditor to draw warrants except upon an unexhausted specific appropriation has no application to the salary of an officer fixed under express authority of the charter in a valid ordinance.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Richard C. Harrison, for Appellant.

Maurice L. Asher, for Respondent.

COOPER, P. J.—This appeal is from a judgment denying appellant's application for a writ of *mandamus*, to compel the respondent to audit a demand upon the treasury of the city and county of San Francisco for the salary of appellant, as assistant district attorney, for the month of July, 1906. It is conceded that there is money in the general fund in the treasury of the city and county of San Francisco sufficient to pay the claim; that such money has not been appropriated to the payment of any claim or demand upon the said treasury, and that proper demand has been made upon the respondent.

The respondent contends that the board of supervisors had made no specific appropriation of money for the payment of appellant's salary for the fiscal year beginning July 1, 1906, and upon this ground claims that his refusal was justified, and this was the view taken by the judge of the superior court. It will, therefore, be necessary to consider the nature of the demand, and the law relative thereto.

Under the charter of the city and county of San Francisco (art. V., sec. 3), the district attorney is authorized to appoint seven assistant district attorneys, who shall each receive an annual salary of \$3,600. The district attorney appointed seven assistant district attorneys under the authority above cited, and appellant was not one of the seven so appointed.

The charter further provides (art. XVI, sec. 35) that when any officer shall require additional deputies, application shall be made to the mayor, who shall make investigation as to the necessity for such additional deputies, and if he find the same necessary he may recommend to the supervisors to authorize the appointment of such additional deputy, and thereupon the supervisors, by an affirmative vote of not less than fourteen members, may authorize such appointment and provide for the compensation of such deputy.

It will thus be seen that it was the intention of the framers of the charter to prevent the appointment of deputies unless deemed necessary by the principal officer, the mayor and fourteen of the supervisors.

Application having been made by the district attorney to the mayor, and the mayor finding it to be necessary, recommended to the supervisors the appointment of an additional assistant district attorney. Upon such recommendation the board of supervisors, on the twenty-ninth day of May, 1905, duly adopted an ordinance, authorizing the district attorney to appoint an additional assistant district attorney at a salary of \$250 per month, which ordinance was duly approved by the mayor. On January 8, 1906, the district attorney, in pursuance of the charter, and the ordinance so adopted by the board of supervisors, duly appointed the appellant such additional assistant district attorney. Appellant duly qualified, took the oath of office, and entered upon the discharge of his duties, and his appointment has not been revoked or annulled. He performed the duties required of him as such assistant district attorney for the month of July, 1906, and has

never been paid therefor. Having performed the services for the city, by the express appointment of the district attorney under the authority of the charter, he should be paid, unless the charter plainly prohibits such payment. The contention is that the payment is prohibited by reason of the charter (art. III, chap. 1, secs. 6, 7), which provides: "Except as otherwise provided in this charter, no money shall be drawn from the treasury unless in consequence of appropriations made by the supervisors, and on warrants duly drawn thereon by the auditor. No warrant shall be drawn except upon an unexhausted specific appropriation."

Does this provision apply to the salary of an assistant district attorney?

The appellant, after his appointment and qualification, held the office by the same title and from the same source as the seven other assistant district attorneys. His compensation was different, and perhaps the duration of his term less certain; but he was one of the assistant district attorneys, and may be said to be the eighth one. Seven were appointed under the direct authority of the charter. Appellant was appointed under the authority of the ordinance, which in turn was authorized by the charter. After the ordinance was passed it must be read into and as a part of the charter for the purposes of this case, and when so read the district attorney had the authority to appoint eight assistant district attorneys. The charter is itself a law of the state. (*People v. Williamson*, 135 Cal. 418, [67 Pac. 504].) The ordinance was a statute of the city and county of San Francisco, consistent with and authorized by the charter, and when the ordinance was passed and the appellant appointed he received his appointment under a law of the state, to wit, the charter. The appointment is of the same weight and dignity as if the ordinance had been embodied in the charter at the time of its adoption. (*Murphy v. City of San Luis Obispo*, 119 Cal. 625, [51 Pac. 1085]; *City of San Luis Obispo v. Fitzgerald*, 126 Cal. 279, [58 Pac. 699].) An assistant district attorney is in fact a deputy district attorney. (*People v. Turner*, 85 Cal. 432, [24 Pac. 857]; *Garnett v. Brooks*, 136 Cal. 585, [69 Pac. 298].)

The charter contains the provision (art. III, chap. 1, sec. 15) that "the board of supervisors shall authorize the disbursement of all public moneys except as otherwise specifically pro-

vided in this charter." The charter specifically provides for the salary of the district attorney and his seven assistants. When the ordinance was passed it specifically provided for the salary of the eighth assistant, and this with the direct authorization of the supervisors. We cannot persuade ourselves that the salaries of the district attorney and of his assistants shall go unpaid because the board of supervisors did not specifically set apart a fund sufficient for their payment in full. The charter does not contemplate that the machinery of the district attorney's office shall be stopped by reason of the errors or willful neglect of the board of supervisors—an independent branch of the city government. The object of the charter is to provide safeguards against the willful and careless expenditure of the public moneys by the board of supervisors, but the board of supervisors has nothing to do with the payment of the salaries of the officers of the city. Such salaries are fixed by law and must be paid.

In *Cashin v. Dunn*, 58 Cal. 581, the auditor refused to audit the salary of plaintiff, who had been appointed a deputy in the office of the superintendent of streets, on the ground that the board of supervisors in fixing the tax levy for the current fiscal year had not appropriated a sufficient amount to pay the salaries of the deputies appointed under the law, and that the allowance was prohibited by the act of February 25, 1878, known as the one-twelfth act. The court held that the "One Twelfth Act" had no application "to the auditing and payment of demands for salaries of officers whose appointment is provided for and salaries fixed by law." (Stats. 1877-78, p. 111.) The writ was ordered to issue.

In *Welch v. Strother*, 74 Cal. 413, [16 Pac. 22], the defendant refused to audit the demand of the plaintiff for his salary as deputy clerk for the month of July, 1887. The appropriation made by the board of supervisors was insufficient, and the "One Twelfth Act" was relied upon. The court said: "Salaries are not liabilities against the treasury which rest upon any authorization or contract by the board of supervisors, or any other officer. They are fixed by law, and not subject to the control of such officers. They are payable out of the general fund, and are not limited to any particular part of that fund which the board may choose to set apart for their payment." The writ was issued.

In *Lewis v. Widber*, 99 Cal. 412, [33 Pac. 1128], which was an application for a writ of mandate against the treasurer of the city and county of San Francisco to compel the payment of the plaintiff's salary as chief clerk of the register of voters, it was held that such salary was payable out of the general fund without regard to the revenues of the previous years. The opinion states: "Our conclusion is that the payment of the salary of a public officer whose office has been created and salary fixed by law, either statutory or constitutional, is not within the provision of said section 18 of article IX of the constitution; that his salary is to be paid out of said general fund when there is sufficient money therein, without regard to revenues of separate years; and that it was a duty specifically enjoined by law upon respondent to pay the said audited demand of petitioner when it was presented on said third day of July."

To the same effect see *City and County of San Francisco v. Broderick*, 111 Cal. 302, [43 Pac. 960]; *People v. Black*, 120 Cal. 553, [52 Pac. 840]; *Stevens v. Truman*, 127 Cal. 155, [59 Pac. 397].

The principle upon which all the above cases were decided is that the restrictions which the organic act imposes upon the setting aside of funds and payment of money out of the treasury do not apply to the payment of demands arising out of liabilities which are placed by law beyond the control of the board of supervisors. The board of supervisors had control in the first place of the question as to whether or not they would authorize the appointment of appellant as assistant district attorney. After having authorized his appointment and after his receiving the appointment and performing the services, the demand for the salary in payment of such services is beyond the control of the supervisors. The cases cited were all relative to the restrictions of the constitution or the one-twelfth act, but they apply in their reasoning with equal force to the charter of the city and county of San Francisco.

The provisions discussed in the cases cited were as stringent as the provisions of the charter.

The late case of *Jackson v. Baehr*, 138 Cal. 266, [71 Pac. 167], arose after the adoption of the present charter. It was there held that the fact that the board of supervisors of the city and county of San Francisco had set apart a special fund for the fees of the trial jurors in criminal cases, and that this

fund was exhausted, is no defense to a *mandamus* to compel the auditor to draw his warrant upon the county treasurer for fees of jurors for each day's attendance upon the court. It is there said: "It is claimed by the defendant that the board of supervisors has set apart \$16,000 for trial jurors in criminal cases, and that this fund is exhausted. That he is expressly forbidden by the charter of the city and county to draw any warrant except upon an unexhausted specific appropriation. It is sufficient, in answer to this, to say that the superior courts are state courts, and criminal cases concern the state and are state affairs. The charter provides that the income and revenue of the city shall be apportioned and kept in separate funds. Among the various funds mentioned is the general fund, which shall consist of moneys received into the treasury and not specifically appropriated to any other fund." It was certainly not intended by the charter to prohibit the payment of any claim out of the general fund, and yet this would be the result of respondent's contention that "no warrant can be drawn except upon an unexhausted specific appropriation."

It has been held that the controller cannot refuse to draw a warrant for a salary fixed by law merely because the legislature had failed to make a specific appropriation. That the fixing of the salary payable monthly out of any money not otherwise appropriated was sufficient. (*Humbert v. Dunn*, 84 Cal. 57, [24 Pac. 111].)

We have discussed the case thus far without reference to the question that an appropriation was in fact made. The bill of exceptions shows that prior to July 1, 1906, the board of supervisors made a budget, and appropriated for the fiscal year commencing July 1, 1906, "\$36,200 for the salaries of district attorney, his assistants, clerks, stenographer and bond and warrant clerks." Appellant was one of the assistant district attorneys, and included in the appropriation. It cannot be said that, because the appropriation was enough for the officers named with the exception of one assistant district attorney, the intention was to exclude this appellant. He was as much an assistant as either of the seven first appointed. The appropriation may become exhausted before the end of the fiscal year, but it certainly was not short for the very first month of the year.

Respondent claims that the appellant was not an officer, that his employment was only temporary, and that no annual salary was fixed. There is no merit in such contention. The charter (art. V, chap. 3, sec. 3) provides that the assistant district attorneys shall each, at the time of his appointment, be qualified to practice law, and to practice in all the courts of the state, and must have been so qualified for at least two years next preceding his appointment. Under the Political Code (sec. 865) the assistant or deputy possesses the powers and may perform the duties of his principal. The position was created under the charter, and by its express authority. The compensation was fixed by the body authorized in the charter to fix it. The duties are fixed by the charter and by statute, and are continuing duties. Such duties will continue while the place continues, although the person might be changed. This in our opinion made the appellant an officer within the rule prescribed by the authorities. (*Mechem on Public Officers*, sec. 38; *United States v. Maurice*, 2 Brock. 96, [Fed. Cas. No. 15,747]; *Patton v. Board of Public Health*, 127 Cal. 397, [78 Am. St. Rep. 66, 59 Pac. 702].)

The judgment is reversed.

Kerrigan, J., and Hall, J., concurred.

[Crim. No. 88. Third Appellate District.—April 22, 1907.]

THE PEOPLE, Respondent, v. W. E. SWAIN, Appellant.

CRIMINAL LAW—PRELIMINARY EXAMINATION FOR GRAND LARCENY—

JURISDICTION OF JUSTICE OF THE PEACE—TRIAL FOR PETIT LARCENY.

Where a justice of the peace, acting as a committing magistrate, conducts a preliminary examination upon a charge of grand larceny, he has no jurisdiction in the same proceeding, without the interposition of the formal complaint required by section 1426 of the Penal Code, to order the defendant to appear before him upon a trial for petit larceny. Such action is a mere attempted usurpation of power and is wholly nugatory and void.

Id.—INDICTMENT FOR GRAND LARCENY—DISMISSAL BY JUSTICE OF THE PEACE NOT A BAR.—Where, upon the subsequent finding of an indictment for grand larceny, the justice of the peace, upon motion of

the district attorney, dismissed the proceeding before him for petit larceny, the defendant cannot plead such dismissal as an acquittal of the lesser offense and a bar to prosecution under the indictment.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order denying a new trial. Wm. M. Finch, Judge.

The facts are stated in the opinion of the court.

McCoy & Gans, for Appellant.

U. S. Webb, Attorney General, W. A. Fish, District Attorney, and J. Charles Jones, for Respondent.

HART, J.—The defendant was prosecuted by indictment for the larceny of four head of hogs, alleged to be of the value of more than \$50, and the property of one E. J. Blossom, and was found guilty by the jury of the crime of petit larceny. He appeals from the judgment and an order denying his motion for a new trial.

Upon his arraignment upon the charge alleged against him in the indictment, the defendant interposed a plea of "not guilty" and also a plea "that he has already been acquitted of the offense charged in said indictment and particularly of the offense of petit larceny included therein, by the judgment of dismissal of the Justice Court of Red Bluff Township, in the County of Tehama, State of California, rendered at Red Bluff, in said County and State, on the 22d day of March, 1906."

The only point urged here and upon which a reversal of the case is asked is founded upon the ruling of the trial court excluding certain testimony bearing upon the plea of "former acquittal." It appears from the record that on the twenty-first day of February, 1906, and about one month prior to the finding and filing of the indictment upon which the defendant was tried, as before explained, a deposition or complaint was filed by one E. J. Blossom before and with the justice of the peace of Red Bluff township as a magistrate, charging the defendant with the crime of grand larceny, said complaint or deposition alleging the asportation of eight

head of hogs "of the value of seventy dollars, the same being the personal property of said E. J. Blossom." An examination of the defendant was had before the magistrate upon this charge, and after hearing all the evidence offered and taking the matter under advisement, the magistrate finally made the following order in the case: "It does not appear to the court from the evidence adduced at the hearing of this case that the crime of grand larceny has been committed by the defendants (the appellant was jointly charged with one Peter McNett), but there is sufficient reason to believe that the crime of petit larceny has been committed by said defendants. Wherefore, it is ordered that said defendants be brought to trial before this court under the complaint filed herein on the 21st day of February, 1906, on the charge of petit larceny." An order was then made setting the case for trial for March 22, 1906. Upon the last-mentioned day, the defendants with their counsel appeared and announced themselves ready for trial, whereupon the district attorney made a motion to dismiss the case pending before the magistrate, who granted said motion "for the reason that it is made to appear that the defendants have been indicted by the Grand Jury of Tehama County, for Grand Larceny, which includes the offense charged in the complaint in this action, which said indictment is now pending in the Superior Court of the County of Tehama, State of California, a certified copy of which last-mentioned indictment has been produced and filed in this court."

It was the refusal of the court to allow proof of the proceedings thus briefly narrated before the magistrate which constitutes the alleged error of which complaint is here made.

The claim is that the dismissal of the proceeding against the defendant by the magistrate after the latter had made an order that the accused be put upon his trial for a misdemeanor under the deposition upon which he had been examined, amounted to his acquittal of the lesser offense, and that, therefore, the prosecution, under the indictment, based upon the same transaction, was barred. This position is the equivalent of the contention that the magistrate, having once legally acquired, as such, authority to preliminarily examine a felony charge, is also in the same proceeding and by the same means invested with jurisdiction to exercise his powers as a justice of the peace, and as such to try the accused upon any lesser of-

fense included within that charged in the deposition, without the interposition of the formal complaint required by section 1426 of the Penal Code. This contention is obviously without merit. The act of the magistrate, after discharging the accused upon the felony charge, in ordering the defendant to appear before him as a justice of the peace for trial upon a misdemeanor upon the complaint or deposition charging the felony, was in excess of that officer's jurisdiction and, therefore, wholly nugatory and void. Under our law the following persons are magistrates: 1. The justices of the supreme court; 2. The judges of the superior courts; 3. Justices of the peace; 4. Police magistrates in towns or cities. (Pen. Code, sec. 808.)

A magistrate is defined to be "an officer having power to issue a warrant for the arrest of a person charged with a public offense." (Pen. Code, sec. 807.)

Section 811 of the Penal Code provides that "when an information is laid before a magistrate of the commission of a public offense, triable within the County, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them." Section 1426 of said code reads: "All proceedings and actions before a justice's or police court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property, as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint."

It is readily to be observed from the foregoing provisions of our Penal Code that proceedings in criminal cases before a magistrate and those before a justice of the peace are entirely different and distinct, and are designed to accomplish widely different purposes. The proceeding before a justice of the peace acting in his *ex officio* capacity of magistrate, is one of the two methods authorized under our system for the inauguration of a prosecution upon ordinary felony charges. The proceeding authorized by section 1426 of the code involves a trial, of which the justice of the peace *as such* has jurisdiction under the law, and is, of course, analogous to a trial for a felony in the superior court. Under the law, a justice of the peace, when exercising the powers of a magis-

trate, has equal authority as such with the justices of the supreme court and judges of the superior courts when acting in a similar capacity.

The jurisdiction of all those officers, when acting in the *ex officio* capacity in question, extends only to taking and hearing evidence upon the felony charge and after hearing the proofs making an order either discharging the accused, or holding him to trial for the offense shown by the depositions to have been committed by him. (Pen. Code, sec. 872.)

Surely, it would not for a moment be contended that a judge of the superior court, acting as a magistrate, could, after discharging the defendant upon the felony charge, make a valid order requiring him to appear *for trial* before a justice of the peace, under the complaint upon which he had been preliminarily examined, for some misdemeanor of which the evidence might show him to be guilty.

The cases cited in the briefs of appellant do not in any aspect of the question presented sustain his position. On the contrary, we are of the opinion that the case of *People v. Smith*, 143 Cal. 598, [77 Pac. 449], relied upon by him, harmonizes with the view of respondent. In that case, the defendant had been charged by a formal complaint in a justice court with the crime of petit larceny. Over an objection by the defendant's counsel, the court, on motion of the district attorney, dismissed the complaint in order to enable the prosecuting officer to file a felony charge against the accused—said felony charge consisting of the crime of petit larceny alleged against him in said complaint, and a prior conviction of burglary. The authority for this proceeding is found in section 1385 of the Penal Code which provides: "The court may, either of its own motion or upon the application of the District Attorney, and *in furtherance of justice*, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

Upon the trial in the superior court upon the felony charge, the defendant, having entered a plea of former acquittal, offered the proceedings of dismissal in the justice court in evidence to sustain that plea, it being admitted that the information upon which he was being tried upon the felony charge "embraced the same charge contained in the complaint charging the defendant with petit larceny, filed in the Justice

Court," and dismissed, etc. Under an objection by the district attorney the evidence was disallowed. It was contended that the ruling was error because of the following provision of section 1387 of the Penal Code: "An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor, but it is not a bar if the offense is a felony."

The court held that the circumstances of that case did not bring it within the provisions of section 1387; that the defendant, having been previously convicted of the crime of burglary, his subsequent perpetration of the crime of petit larceny was an act constituting a felony, under the terms of section 666 of the Penal Code. Here, as seen, the appellant was never charged by a complaint, as required by section 1426 of the Penal Code with the crime of petit larceny. The mere declaration by the magistrate that the evidence taken at the preliminary hearing of the felony charge disclosed a case of petit larceny against the accused, and the order that he be required to appear for trial under the complaint or deposition charging the felony, amounted to no more than such a declaration and order by a private citizen. It was, as we have declared, an attempt upon the part of the magistrate to exercise authority not within his jurisdiction as such officer—a mere attempted usurpation of power. It will, of course, be conceded that a magistrate's order discharging a defendant does not operate as a bar to a second hearing of the charge either by the magistrate himself or by a grand jury. (Pen. Code, sec. 999; *Patterson v. Conlan*, 123 Cal. 454, [56 Pac. 105].)

From the foregoing reasons, it follows that the court's ruling disallowing the testimony was clearly within the law.

This being the only point urged upon this appeal, the judgment and order appealed from will, therefore, be affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 37. Third Appellate District.—April 23, 1907.]

THE PEOPLE, Respondent, v. PHILIP JAMES, Appellant.

CRIMINAL LAW—MURDER—EXPERT EVIDENCE—HYPOTHETICAL QUESTION.

In a prosecution for murder, a medical expert testifying for the prosecution may be asked a hypothetical question based upon the evidence for the prosecution. It was not necessary that it should include all of the evidence in the case.

ID.—WAIVER OF OBJECTION TO HYPOTHETICAL QUESTION—IMPROPER OBJECTION.—An objection to the form of a hypothetical question as involving a conclusion, which was not urged in the superior court, and which could not prejudice the defendant, is waived and a general objection that the question was a "hypothetical question not warranted by law," raises no issue and amounts to nothing.

ID.—INSTRUCTIONS—BURDEN OF PROOF AS TO ELEMENTS OF CRIME.—An instruction that "each and every fact and circumstance relied upon by the prosecution must be proved by the evidence beyond all reasonable doubt, and if the jury are not satisfied beyond a reasonable doubt that each such fact and circumstance has been proven, it is your duty to find a verdict of not guilty," is not prejudicial to the defendant, and is to be construed with other instructions given wherein the people's duty to prove beyond a reasonable doubt all the elements of the crime charged was clearly set forth.

ID.—PRESUMPTION OF INNOCENCE—INSTRUCTION REQUESTED BY DEFENDANT.—The defendant cannot complain of an instruction requested by himself, "that the presumption of innocence attaches at every stage of the case and to every fact essential to a conviction, and remains with the defendant throughout the trial until the contrary is established beyond a reasonable doubt."

ID.—HOMICIDE BY OFFICER—REFUSAL OF INSTRUCTIONS—PRESUMPTION OF OFFICIAL DUTY.—Where an officer was charged with murder, the court properly refused to instruct the jury "that the law presumes that, if the defendant was an officer and acting as such at the time of the alleged homicide, he was doing his duty," as it conveys the misleading suggestion that if the defendant was an officer he had the right to kill the deceased.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. **E. C. Hart**, Judge.

The facts are stated in the opinion of the court.

Charles B. Harris, and James L. Copeland, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—Appellant was tried on an information charging him with murder, and he was convicted of manslaughter. He has appealed from the judgment and order denying his motion for a new trial. The assignments of errors relate to certain instructions given and refused and to the action of the trial court in overruling an objection to a hypothetical question addressed to one of the witnesses for the people. We will notice in the order presented in his brief all of the points upon which appellant relies for a reversal of the judgment.

Dr. Stevenson, a medical expert for the people, was asked this question: "Suppose a man weighing 130 pounds or thereabouts was struck with sufficient force by a man weighing 180, 190 or 200 pounds, to knock him down twice within a short period of time, the first blow being succeeded by a struggle, and during that struggle the smaller man was choked for a period of half a minute, at first lightly and then gradually increasing it until he let go his hold upon a revolver; after the second blow he had some difficulty in arising, but got up, walked a space of fifteen or twenty feet, or ten feet; then walked a space of thirty or forty or fifty feet without staggering; his muscles co-ordinating, and during that period, talks coherently. What can you say as to the mental condition of such smaller man?" Counsel for defendant made this objection: "I object to the question as not founded upon the facts as proven by the prosecution in this case." Thereupon, in response to the question by the court, "Wherein is it defective or wherein does it not conform to the facts?" counsel answered: "In this, that the witness Bridge called by the prosecution testified that when the defendant first got up, he staggered to the bar; that after he got the pistol he walked in a stooping position, that he gradually braced up and walked a little better, so it is not founded upon the testimony." "Very well," said the district attorney, "after he got the pistol there was a little swaying, but he quickly gathered himself and walked naturally, without staggering

or swaying, all of his muscles apparently co-ordinating!" Counsel for appellant again objected "on the same grounds; on the further ground that it calls for an opinion on a hypothetical question not warranted by law." The objection was overruled and an exception taken.

There is evidence in the record of all the facts embodied in the foregoing question, and as the objection went only to that point the ruling of the court was obviously correct. It was not necessary for the question to embrace all the evidence in the case. Indeed, if that were the rule, hypothetical questions would generally be impossible on account of the conflict usually created by the testimony.

The rule is clearly stated in *People v. Hill*, 116 Cal. 566, [48 Pac. 711], by Mr. Justice Van Fleet, as follows: "While the question should have for its basis some probable, or at least possible, theory to be deduced from the evidence in the case, counsel have a right to frame the question to accord with their theory of what the material facts are as shown by that evidence, and in so doing may omit facts which from their point of view have no material bearing upon the subject." Thompson on Trials is therein quoted to the following effect: "The hypothetical questions must be based either upon the hypothesis of the truth of all the evidence, or upon a hypothesis specially framed of certain facts assumed to be proved for the purpose of the inquiry. Such questions leave it for the jury to decide in the first case whether the evidence is true or not, and in the second case whether the peculiar facts assumed are or are not proved." And again: "It is no objection to a hypothetical question that the state of facts which it assumes is erroneous, if within the possible or probable range of the evidence. . . . It is the privilege of counsel in such cases to assume within the limits of the evidence any statement of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purposes of the question, and for no other purpose." Jones on Evidence, volume 2, section 372, cited by appellant, states the rule also in line with the other authorities: "While it is impossible to lay down any unyielding rule as to the form of the hypothetical question in such cases, it is clear that the question should be so framed as to fairly and clearly present the state

of facts which the counsel claims to be proved and which the testimony on his part tends to prove."

But appellant contends that facts and not opinions must be assumed in the question (Rogers on Expert Testimony, sec. 30) and that the objection should have been sustained because the words "co-ordinating" and "coherently" presuppose the mental condition which it is the exclusive province of the jury to determine. Granting that these words are objectionable as involving a conclusion, it is difficult to see how their use could have prejudiced appellant. But a complete answer to the contention is that no such objection was made in the court below as is presented here. The additional objection that it was "a hypothetical question not warranted by law" raises no issue and amounts to nothing.

In the case of *People v. Mahoney*, 77 Cal. 532, [20 Pac. 73], the district attorney asked one Dr. B. F. Carpenter the question: "From an examination of the wound and the course of the bullet, in your opinion would it have been possible for the deceased to have shot himself?" Defendant objected on the ground that it was "incompetent, no foundation having been laid for it." The district attorney then declared he would lay the foundation and he proceeded to interrogate the witness as to his competency. The hypothetical question was then repeated, and it was objected to by defendant's counsel as "*incompetent and irrelevant, no foundation being laid for the testimony.*" The objection was overruled and an exception taken. The answer of the witness to the question was, "No, sir; he did not." The supreme court, in discussing the matter, said: "It appears quite clear, therefore, that the only question upon which the court was asked to pass was, whether the witness had not sufficient experience in such matters to enable him to speak as an expert—to give his opinion—not whether the opinion, if given, was competent evidence. The objection made was not specific, if the point now urged was the one which counsel desired the court to pass upon at the trial." The above question addressed to Dr. Carpenter was of the gravest importance and clearly called for incompetent testimony; and his answer may have caused the conviction of the defendant, and it is apparent that if the proper objection had been made, in case of an adverse ruling below, the defendant would have secured a reversal in the appellate court.

Here it could be demonstrated that the objectionable words—assuming them to be objectionable—could not have prejudiced the defendant. But we uphold the order of the court upon the ground that, in view of the particular objection made, the ruling was undoubtedly sound.

It is urged that the court erred in giving the following instruction: "You are instructed that each and every fact and circumstance relied upon by the prosecution to establish the guilt of the defendant must be proved by the evidence beyond all reasonable doubt, and if the jury are not satisfied beyond all reasonable doubts that each such fact and circumstance has been proven it is your duty to find a verdict of not guilty." The suggestion made in reference to this instruction seems exceedingly hypercritical and destitute of any merit. It would be unreasonable to hold that to the average mind the language used could mean anything more or less than that the burden is upon the prosecution to establish beyond a reasonable doubt the crime charged against the defendant, and that if any fact or circumstance necessary to constitute such crime is not so established the defendant must be acquitted. The only other inference likely to be drawn is that the burden is upon the people to prove all the facts and circumstances which the prosecution has introduced in evidence, whether material or not, to establish the crime. This, it is needless to say, is stating the law more favorably to defendant than he has a right to demand. But if we concede that the instruction, standing apart, might be deemed somewhat obscure, no such imputation can be made when we consider it in connection with the other instructions given by the court wherein the people's duty to prove beyond a reasonable doubt all the elements of the crime charged was clearly set forth.

Appellant also assails the following portion of one of the instructions given: "This presumption of innocence attaches to every stage of the case and to every fact essential to a conviction and remains with the defendant throughout the trial until the contrary is established by proof beyond a reasonable doubt." The contention is made that the presumption of innocence remains with the defendant until a verdict is rendered and not simply "until the contrary is established by proof beyond a reasonable doubt."

In *People v. Arlington*, 131 Cal. 235, [63 Pac. 347, 349], a similar instruction was upheld by the supreme court in the following language: "The court told the jury that 'it is a presumption that abides with him throughout the trial of the case,' and we do not think the language 'until the evidence convinces you to the contrary beyond all reasonable doubt' conveyed the impression that the presumption ceased to operate at the close of the evidence of the prosecution or at any time before the jury had finally determined upon a verdict. The court meant and, we think, must have been by the jury understood to mean that the presumption remained to the last with defendant and until in their deliberations upon the evidence they became convinced of his guilt." That decision is controlling here. But, again, appellant cannot complain of the instruction because he requested the court to so instruct the jury, as shown in the transcript, folios 180-182. The court instructed the jury in the identical language requested by appellant. It needs no citation of authorities under such circumstances to show that appellant cannot complain, even granting that the instruction fails to state the law correctly.

The only other point made is that the court erred in refusing to give all of a certain instruction requested by defendant. The part eliminated reads as follows: "And you are further instructed that the law presumes that if the defendant was an officer and acting as such at the time of the alleged homicide that he was doing his duty." Appellant seeks to justify his contention by citing subdivision 15 of section 1963, Code of Civil Procedure, which provides that it is presumed "that official duty has been regularly performed"; but the proposed instruction goes far beyond the presumption of the regular performance of official duty. It conveys the suggestion that if the defendant was an officer he had a right to kill the deceased. Peace officers are justly invested, under our law, with considerable discretion and power, but it could hardly be contended seriously that a homicide committed by one is presumed to be justifiable simply because of his official position. At best the instruction was obscure and misleading. As far as it inferentially contained a correct legal principle it was covered by instructions given. Besides, it does not appear that it was requested by appellant.

We have examined with anxious care all the suggestions made and authorities cited by counsel, but we find in the record no error whatever. The judgment and order are affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1907.

[Civ. No. 322. Third Appellate District.—April 23, 1907.]

DAVID PRINE, Respondent, v. MARGARET A. DUNCAN,
Appellant.

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT IN TIME.—An appeal from a judgment must be dismissed for a failure to file the transcript on appeal within forty days after the appeal is perfected if no proceeding is pending for the settlement of a bill of exceptions or statement to be used on the appeal.

Id.—DISMISSAL OF PENDING PROCEEDINGS—LAPSE OF TIME.—Where all pending proceedings to settle a statement on motion for a new trial and all proceedings on the motion were dismissed, and more than forty days thereafter had elapsed without filing a transcript on appeal from the judgment, and no appeal from the order was taken within the time prescribed by law, and there is no answer to the motion to dismiss the appeal from the judgment, it must be dismissed.

MOTION to dismiss an appeal from a judgment of the Superior Court of Colusa County. W. M. Finch, Judge.

The facts are stated in the opinion of the court.

C. F. Purkitt, and C. L. Donohoe, for Appellant.

Thomas Rutledge, for Respondent.

CHIPMAN, P. J.—Motion to dismiss the appeal from the judgment.

It appears that final judgment was entered in this case on January 15, 1906; on July 13, 1906, the defendant served no-

tice of appeal and on July 14, 1906, filed herein an undertaking on appeal; no bill of exceptions, or statement, or statement on appeal has been settled or filed; on November 17, 1906, the trial court made and entered its order dismissing all proceedings by defendant for the purpose of settling her statement on motion for a new trial; notice of appeal from said last-named order was not filed herein until January 17, 1907; appellant has not requested the clerk of the court to certify to a correct transcript of the record in said cause. The papers on the motion to dismiss the appeal were filed in this court February 8, 1907, prior to which time service of notice was duly made upon appellant.

The ground of the motion is "that appellant has not filed in this Court a transcript of the record in said cause or any transcript, and that on the 17th day of November, 1906, the said Superior Court of the County of Colusa in said cause entered its order dismissing all proceedings then pending for the settlement of the statement on said motion for a new trial, and all proceedings for a new trial of said cause instituted by said appellant, and that no appeal has been taken by said appellant from said last-mentioned order within the time allowed by law." Appellant makes no answer to said motion and has failed to appear.

Rule II of this court [144 Cal. x] requires that the transcript in a civil action be filed within forty days after the appeal is perfected; provided that there be then pending no proceeding for the settlement of a bill of exceptions or a statement which may be urged in support of such appeal. Here, whatever of such proceedings as had been pending were dismissed November 17, 1906, and were no longer pending. Rule V [144 Cal. xli] provides that if the transcript or the record be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If, however, the transcript, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion.

There being no answer to the motion in any form, and the facts above set forth being uncontroverted, the appeal from the judgment must be dismissed, and it is so ordered.

Burnett, J., and Hart, J., concurred.

[Civ. No. 338. Second Appellate District.—April 24, 1907.]

PEOPLE'S LUMBER COMPANY, Respondent, v. ALEX GILLARD et al., Defendants; J. F. WHITE and C. F. HICKSON, Appellants.

BOND OF BUILDING CONTRACTOR—VALIDITY AT COMMON LAW—APPEAL—LAW OF THE CASE.—Where, upon a former appeal, the question was raised whether section 1203 of the Code of Civil Procedure, under which a contractor's bond was given, was constitutional, and it was held that the bond, having been voluntarily given, was valid and enforceable as a common-law bond, said decision is the law of the case upon a second appeal, where the voluntary issue of the bond does not appear to have been in issue.

ID.—PURVIEW OF LAW OF THE CASE.—The law of the case is not confined, in this state, to that portion of the opinion of the appellate court which can be said to be strictly essential to the disposition made of the case.

ID.—CHANGES MADE PURSUANT TO BUILDING CONTRACT—PLEADING—FINDINGS.—Where, pursuant to the decision made on the former appeal, the complaint was allowed to be amended, to set forth changes made pursuant to the terms of the contract, in an action against the sureties on the contractor's bond, and issues were joined thereupon, a finding that the changes were made pursuant to the contract conforms to the amended complaint.

ID.—STATUTE OF LIMITATIONS—AMENDED COMPLAINT.—The amended complaint setting out the change provided for in the contract did not state a new cause of action, foreign to the case, made in the original complaint, on the contractor's bond, so as to allow a plea of the statute of limitations thereto.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

J. S. Chapman, and Ward Chapman, for Appellants.

Blackstock & Orr, and L. B. Slosson, for Respondent.

TAGGART, J.—Appeal from judgment in favor of plaintiff and from an order denying motion of defendants White and Hickson for a new trial.

Plaintiff furnished material to the defendants Gillard and Leary as contractors to be used in the construction of a high school building in the town of San Buenaventura. Defendants White, Hickson and Darancette were sureties on a bond in the penal sum of \$7,000 given to insure the faithful performance of the contract entered into by Gillard and Leary with the trustees of the high school district, and the payment of all just claims against said building for labor and material. Said bond being conditioned to inure to and for the use and benefit of any and all persons who perform labor for or furnish materials to the said contractors (in pursuance of said contract), etc.

The action is brought against the contractors and sureties on the bond. It was dismissed as to Darancette and judgment given against the other defendants for \$1,753.97 and costs. Gillard and Leary made default and the defendants White and Hickson appeared and defended and now appeal from the judgment and order aforesaid.

Appellants urge in support of their appeal and as reasons for reversing said judgment and order: (1) That the bond upon which their liability rests was given pursuant to section 1203 of the Code of Civil Procedure, that that section is unconstitutional and any bond given in pursuance of it is void and unenforceable; (2) that the action was barred by the statute of limitations; and (3) that the court erred in sustaining plaintiff's objections to certain testimony offered in evidence by the defendants.

This is the second appeal. On the former appeal the supreme court directly decided the question raised by the first ground of appeal here presented. It was held that the bond in question "derives force from its provisions and not from the statute," and that it "may be enforced." No such other or different attack is now made upon the sufficiency of the bond as to bring the case within the rule declared in *Anderson v. Hancock*, 64 Cal. 455, [2 Pac. 31], and similar cases. The determination of the character and validity of the bond was the decision by the supreme court of a question of law, as distinguished from an inference or finding of fact made by that court. (*Wallace v. Sisson*, 114 Cal. 45, [45 Pac. 1000].) The validity or enforceability of the bond did not then, and does not now, depend upon the determination of any issue of fact. The ruling on the former appeal was

predicated on the admitted truthfulness of the allegation in the original complaint that the bond was "given in pursuance of section 1203." The question arises now upon the undisputed finding of the court to the same effect. The finding "That said bond was given by defendants, Gillard and Leary, in pursuance of the provisions of section 1203 of the Code of Civil Procedure," responds to and covers all the issues raised by appellants' answer to the amended complaint as to the validity of the bond. Appellants contend that an issue of fact was presented by the pleadings upon the second trial as to whether or not the bond was voluntarily given. The answer to the amended complaint does not allege that the bond was not voluntarily given, and the record fails to show that any such issue of fact was before the trial court.

The objections to the sufficiency of the complaint in the respect here under consideration, made on the first appeal, were: (1) Section 1203 is unconstitutional; (2) the act being void, the bond made pursuant to it is void; and (3) "The bond being a statutory bond, the right to sue on it comes alone from the statute, and that the complaint must set forth the facts on which the statutory right of action depends, which it is claimed the complaint fails to do." (*People's Lumber Co. v. Gillard*, 136 Cal. 57, [68 Pac. 576].) The supreme court says, in effect, passing over the objection as presented by the first two grounds, and admitting that the bond is, in form, a statutory bond, the right to sue on it does not come alone from the statute. It was voluntarily made, and may be enforced as a common-law bond.

If the determination of the law of the case here resolves itself into a question of whether or not the opinion of the supreme court on the former appeal in relation to the validity of the bond under consideration was *dictum*, the rule in this state is clear. Other jurisdictions have taken other views, and the range of the authorities on this question is thus stated in Bouvier: "According to the more rigid rule, an expression of opinion however deliberate upon a question however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum*; but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it

was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point."

Since an early date the supreme court of this state has refused to adopt the rule which confines the law of the case to that portion of the opinion of the appellate court which can be said to be strictly essential to the disposition made of the case. (*Dewey v. Gray*, 2 Cal. 374; *Gunter v. Laffan*, 7 Cal. 589; *Davidson v. Dallas*, 15 Cal. 84; *Phelan v. San Francisco*, 20 Cal. 39; *Table Mountain v. Stranahan*, 21 Cal. 548; *Gwinn v. Hamilton*, 75 Cal. 266, [17 Pac. 212]; *Page v. Fowler*, 37 Cal. 105; *Porter v. Muller*, 112 Cal. 366, [44 Pac. 729].) In *Phelan v. San Francisco*, 20 Cal. 39, Field, C. J., states the rule of the law of the case as follows: "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled according to its intrinsic merits; but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." The reason for the rule of the law of the case is said in some of the cases to rest upon the doctrine of *res adjudicata* (*Soule v. Dawes*, 14 Cal. 250); in others, upon the want of power, when the cause has gone beyond the jurisdiction of the appellate court, for it to annul or reverse its decree or judgment for any error of fact or law, and because the rule is necessary as a matter of public policy (*Sharon v. Sharon*, 79 Cal. 654, [22 Pac. 26].) Considered by the rule of *res adjudicata* the authorities are conclusive, and no clear distinction can be drawn between the rule of *res adjudicata* and the rule of finality of decision declared in the latter case. (*Sharon v. Sharon*, 79 Cal. 654, [22 Pac. 26].)

It is immaterial that the decision was erroneous; the rule is the same in all cases, regardless of the correctness of the decision. (*Page v. Fowler*, 37 Cal. 105; *Sharon v. Sharon*, 79 Cal. 654, [22 Pac. 26].)

As we read the opinion in *Wixson v. Devine*, 80 Cal. 385, 22 Pac. 224, there is nothing in conflict with the decisions in the foregoing cases in respect to this question. In that case the court is considering expressions of opinion which are purely "obiter." Of the portions of the opinions referred

to in that case the court says: "They were not the subject of review on his appeal. There was no occasion, therefore, for this court on that appeal to say anything as to the correctness or incorrectness of these rulings."

The language here under consideration was in no sense "*obiter*." The questions of the constitutionality of section 1203 of the Code of Civil Procedure, and the validity of the obligation upon which this action was brought, were directly presented and argued by counsel, and decided by the court on the former appeal; and, had the decision of the court at that time upon this question been in favor of appellants, it would have concluded the case. If it be conceded that the opinion was *dictum* at all, it would have to be classified as *judicial* as distinguished from *obiter*.

Whatever opinion we may entertain as to the policy of the rule, or the validity of the bond, it is clear from the authorities that it was the duty of the superior court and it is our duty to hold the bond valid and enforceable, under the law of the case.

The contract contained the following clause: "Third. Should the said board of trustees at any time during the progress of said building request any alterations, deviations, additions, or omissions from the said contract, specifications, or plans, they shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation." The original complaint counted upon material furnished under, and a breach of, the contract generally, as the measure of defendants' liability on the bond. After the former appeal the complaint was amended to meet the suggestions of the supreme court in regard to these matters upon which the reversal of the judgment was based. In the amended complaint certain changes in the contract and building are alleged to have been made under and pursuant to the above-mentioned clause, after the execution of the said contract. Issues of fact were joined by the answer, upon the questions whether or not these changes were made pursuant to the provisions of the contract or otherwise, and whether or not the changes so made materially altered the contract so as to relieve the defendant sureties from their obligation on the bond. The trial court found the changes to have been made pursuant to the con-

tract and not otherwise. This finding was in conformity with the allegations of the amended complaint.

To sustain their plea of the statute of limitation appellants contend that because of the additional allegations as to the changes made under this contract, the amended complaint states a new and different cause of action, and that as to the cause therein stated the action was not commenced until the amended complaint was filed. The language of the opinion of the commissioner on the former appeal is quoted in appellants' brief as an apparent authority for the contention that the amended complaint counts on a "*different contract*." The language quoted shows upon its face that it refers to the claim of the appellants that the contract was changed and modified independent of its own provisions. Changes or alterations made in conformity with the provisions of the contract were not being considered when the language quoted was used. The allegations setting out the changes provided for in the contract do not state a new or different cause of action foreign to the original complaint. (*Frost v. Witter*, 132 Cal. 425, [84 Am. St. Rep. 53, 64 Pac. 705].) The measure of the recovery asked is still based upon the material furnished for the high school building under the contract, and defendants' liability to pay is based upon a breach of the same conditions of the bond, under the amended complaint, that it was under the original complaint.

The error specified in the record relating to the refusal of the court to permit the witness Leary to continue his statement in regard to the board of trustees not agreeing to pay for alterations made is not urged in appellants' brief. The testimony was in direct conflict with the provisions of the written contract, and the ruling of the court might be justified on that ground, but since the matter is not presented, we assume that it is not relied upon by appellants. We see no error in the record to justify a reversal of the judgment or order complained of.

Judgment and order affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 20, 1907.

[Civ. No. 306. Third Appellate District.—April 24, 1907.]

ARCHIBALD ESTATE, a Corporation, Appellant, v. A. H. MATTESON, Respondent.

ACTION FOR MONEY LOANED—EVIDENCE—ERROR IN NONSUIT.—In an action for money loaned by a corporation, where the plaintiff's evidence showed that the corporation had authorized its president officially, as such, to draw checks for the moneys; that he had no money in bank to his own credit; that the checks of the corporation were signed by him officially in favor of the defendant for the amount of the alleged loan, and were cashed by defendant and returned to the secretary, after the president's death; that defendant had admitted receiving the money; that it had not been repaid; and that the deceased president had stated to the secretary that the money had been loaned to the defendant—the court erred in granting a nonsuit.

ID.—EFFECT OF MOTION FOR NONSUIT—DEMURRER TO EVIDENCE—QUESTION OF LAW—INFERENCES OF FACT.—A motion for a nonsuit cannot be granted where plaintiff's evidence *tends* to establish the material averments of the complaint. The motion operates practically as a demurrer to plaintiff's evidence, and assumes the truth of the facts proved and of all reasonable presumptions and inferences of fact therefrom, and presents a pure question of law for the court.

ID.—INCOMPETENT EVIDENCE—HEARSAY—CROSS-EXAMINATION.—Where hearsay evidence which had been excluded in chief was brought out by the defendant on cross-examination of the secretary, as to declarations made by the deceased president, effect must be given to it on the motion for nonsuit. Error in admitting evidence for the plaintiff cannot be reviewed on motion for a nonsuit.

ID.—INAPPROPRIATE FINDINGS ON MOTION—CREDIBILITY OF WITNESSES—PROBATIVE POWER.—It was inappropriate for the court to make findings of fact on the motion for a nonsuit. The question of the credibility of witnesses cannot arise upon such motion except to give to the testimony for plaintiff its full probative power.

ID.—TRIAL BY COURT—IMMATERIAL DISTINCTION AS TO NONSUIT.—There is no difference in the power and duty of the court, when sitting as a jury, and when trying a case by jury, as regards the decision of a motion for nonsuit, the rules for the decision of which are the same in either case. The only question to be decided is whether plaintiff's evidence has made a *prima facie* case.

APPEAL from a judgment of the Superior Court of Madera County. W. M. Conley, Judge.

The facts are stated in the opinion of the court.

R. L. Hargrove, for Appellant.

Raleigh E. Rhodes, for Respondent.

HART, J.—The plaintiff corporation brought this action to obtain judgment from the defendant for the sum of \$1,050, alleged to have been loaned by the former to the latter. When plaintiff rested its case, the court, upon the application of defendant, granted a nonsuit, and it is from this judgment of nonsuit, upon a bill of exceptions, that this appeal is taken.

This cause has previously been before this court on an appeal from a judgment of nonsuit, and the judgment reversed. (*Archibald Estate v. Matteson* (Cal.), 84 Pac. 840.) The reversal was based upon the proposition, according to the opinion filed in the case, that there was evidence disclosed by the record tending to establish the material averments of the complaint, and that, therefore, the court erred in ordering a nonsuit.

The learned judge of the court below, in granting a nonsuit in the case now before us, filed findings of fact and conclusions of law. He also filed a written opinion (which is incorporated in the opening brief of counsel for appellant) setting forth the reasons upon which he reached his conclusion upon the motion for a nonsuit.

There was but one witness, W. J. Archibald, secretary of corporation plaintiff, produced upon behalf of plaintiff, and his testimony, together with certain documentary evidence, introduced into the record all the facts upon which plaintiff seemed to have relied and from the character of which the court felt justified in making its ruling, resulting in the granting of the nonsuit.

From the evidence thus adduced we learn that the Archibald Estate was organized as a corporation on the eleventh day of May, 1904; that on the fourth day of June, 1904, there was held by the directors of the corporation a meeting, at which, with the transaction of other business, J. F. Archibald was elected president of the corporation or of the said board of directors thereof, and W. J. Archibald, the witness (and a nephew of J. F. Archibald), was made secretary; that on June 4, 1904, J. F. Archibald, the president, etc., executed a

deed transferring to said corporation all the real and personal property of which he was seised and possessed, and that on July 5, 1904, he turned over to the corporation by check all the money he had on deposit in the Commercial Bank of Madera, amounting to the sum of \$3,082.55. This check and the deed conveying the real and personal property to the corporation were offered and received in evidence. On the fourth day of June, 1904, the board of directors of said corporation passed and adopted the following resolution, which was admitted in evidence as a part of the minutes of the proceedings of the board of that day: "Resolved, that the President of this corporation be and he is authorized, empowered and directed to draw from any bank or person or corporation in which may be deposited any of the money or funds of this corporation, upon his own signature and request, and the signature of the Secretary shall not be necessary to draw said money or funds."

The sum claimed to have been loaned by plaintiff to defendant was received by the latter in two different amounts or installments in the form of checks. These checks were received in evidence and were as follows:

"Madera, Cal., September 1, 1904.

"Commercial Bank of Madera. Pay to the order of A. H. Matteson the amount Eight Hundred dollars.

"\$800.00 (Signed) J. F. ARCHIBALD, Pres."

(Indorsed) (Signed) "A. H. MATTESON."

(Across the face is stamped) "Paid, 9—2—04."

"No. Madera, Cal., October 22nd, 1904.

"Commercial Bank of Madera. Pay to the order of A. H. Matteson amount two hundred fifty dollars.

"\$250.00 (Signed) J. F. ARCHIBALD, Pres."

(Indorsed) (Signed) "A. H. MATTESON."

(Across the face is stamped) "Paid, 10—2—04."

The evidence shows that J. F. Archibald died on the thirteenth day of November, 1904. The witness W. J. Archibald stated that said checks were drawn on the funds of the corporation. The passbook of the Archibald Estate issued by the Commercial Bank of Madera, showing that the corporation had sufficient money on deposit in that institution to cash said checks, was admitted in evidence. Witness Archi-

bald testified that the bank in which the money of plaintiff was deposited was instructed to pay money on checks issued by J. F. Archibald and signed by him as president, in accordance with the resolution to that effect adopted by the board of directors on the fourth day of June, 1904. He further testified that the deceased, J. F. Archibald, had no money in his individual name on deposit in said bank; that he had held conversations with deceased prior to his death, in which the latter had declared that he had loaned the money to the defendant; that on the twenty-first day of November, 1904, the board of directors of the plaintiff held a meeting at which a resolution was adopted directing that a demand be made upon the defendant for the payment to the corporation of the sum of money in dispute; that previous to the institution of this suit, he held a conversation with the defendant, who then admitted having received the money on the checks heretofore referred to; that there was no written evidence either by note or mortgage or other written contract, of the alleged transaction between the plaintiff and defendant; that during the lifetime of the deceased and after the organization of the corporation all moneys withdrawn from the Commercial Bank of Madera by the corporation were so drawn by checks signed "J. F. Archibald, Pres." On cross-examination this witness admitted that there was no record either in the minutes of the proceedings of the corporation or in any other book kept by it for the purpose of preserving the history of its business dealings, of the alleged transaction between plaintiff and defendant. He admitted that J. F. Archibald paid personal bills and accounts against himself through checks upon the Commercial Bank signed by him as "Pres." He further admitted that he knew nothing of the transaction to which this controversy relates, except such knowledge with reference thereto as he had obtained from an inspection of the checks after they had been cashed and turned over to plaintiff by the bank, and such information as he had gathered from the deceased in conversations with him upon the subject before his death and that learned from the defendant himself in a conversation a short time preceding the commencement of this action. In other words, the witness admitted having no personal knowledge of the transaction.

The facts thus detailed are substantially all that were presented by plaintiff and upon which it rested its case.

The complaint is in the ordinary and usual form in actions for money had and received, and is verified. The answer denies the averments of the complaint and sets up a special defense to the effect that said cause of action "is barred by the provisions of section 1973 of the Code of Civil Procedure," and "particularly subdivision 1 of said section," and by way of a plea in abatement alleges, that if the defendant is indebted to plaintiff in the sum sued for or in any other sum, the action is prematurely brought, for the reason that cause therefor has not accrued to plaintiff, etc. But it does not appear definitely from the answer how or why the action is barred or was prematurely commenced, nor does the evidence furnish any light upon the subject. The only question, therefore, demanding inquiry and discussion is whether or not, from the standpoint of the evidence, received upon the merits of the transaction, the court erred in its order granting the nonsuit. We know of no rule of law more firmly rooted in the procedure of our system of jurisprudence than that which forecloses a court from ordering a nonsuit upon the close of plaintiff's case where the evidence presented by the plaintiff *tends* to establish the material averments of the complaint. A motion for a nonsuit in purpose and effect practically operates as a demurrer to the evidence, and must therefore assume that all the facts given in evidence to support the material allegations of the complaint speak the truth. The consequence of the rule as thus stated is that a motion for a nonsuit presents for the decision of the court a pure question of law. (*Cravens v. Dewey*, 13 Cal. 41; *Dona-hue v. Gallavan*, 43 Cal. 576; *Schroeder v. Schmidt*, 74 Cal. 460, [16 Pac. 243]; *Warner v. Darrow*, 91 Cal. 311, [27 Pac. 737]; *Goldstone v. Merchants' etc. Co.*, 123 Cal. 631, [56 Pac. 776]; *Wright v. Roseberry*, 81 Cal. 87, [22 Pac. 336].)

The sole question, therefore, is: Does the evidence tend to prove the material averments of the complaint? If it does, then the judgment of nonsuit cannot stand. The evidence must, of course, establish a *prima facie* case. The proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. (*Janin v. London etc. Bank*, 92 Cal. 14, [27 Am. St. Rep. 82, 27 Pac. 1100].) But where the

evidence and the presumptions reasonably arising therefrom are legally sufficient to prove the material allegations of the complaint, a nonsuit should be denied. (*Felton v. Millard*, 81 Cal. 540, [21 Pac. 533].) Or, even where there is a conflict in the evidence, and some evidence tends to sustain the plaintiff's case, a motion for a nonsuit should not be allowed. (*Pacific Mut. L. I. Co. v. Fisher*, 109 Cal. 567, [42 Pac. 154]; *Wassermann v. Sloss*, 117 Cal. 425, [59 Am. St. Rep. 209, 49 Pac. 566].) The record here shows that certain testimony given by the witness Archibald was purely secondary or hearsay, and should have been excluded, and it may be stated that where objection was interposed against such evidence the court promptly and properly sustained the objection. But most of the objectionable testimony referred to was brought out by the defendant himself upon the cross-examination of Archibald. But it is nevertheless argued by counsel for respondent that such testimony is not competent in any view of the proposition to be considered in the determination of the question of whether or not a nonsuit should have been granted. If it were within the province of this court upon an appeal from a judgment of nonsuit to review errors involved in admitting incompetent testimony, the respondent would hardly find himself in a position to complain. A party cannot take advantage of his own fault or wrong. This is, however, a proposition which cannot enter into the consideration of the question of whether a nonsuit should or should not have been granted, for even if evidence be erroneously admitted against objection, but tends to prove the averments of the complaint, full effect must be given to it upon motion for a nonsuit. (*Wright v. Roseberry*, *supra*.) The rule, in other words, is that where, upon a motion for a nonsuit, the testimony is relevant but may be inadmissible under some rule of evidence, and is admitted either without or against objection, it must be given the effect of its full probative force. "Error in admitting evidence for the plaintiff cannot be reviewed on a motion for a nonsuit." (*O'Connor v. Hopper*, 102 Cal. 528, [36 Pac. 939].) And in the consideration of a motion for a nonsuit it is the duty of the court to view the testimony in the strongest and most favorable light for the plaintiff.

Do the facts as developed by the evidence, and of which we have presented an epitome, sufficiently meet the criterion established by the rules thus declared, or, in other words, do they make out a *prima facie* case for plaintiff?

A résumé of the record as briefly given here will show that there is proof that all the property, real and personal, including the money he had on deposit in the Commercial Bank, was transferred by J. F. Archibald to the Archibald Estate corporation; that the corporation authorized said Archibald to draw any moneys belonging to it and on deposit in any bank or with any corporation or person on his check, signed by his name as president of the corporation; that he had no money credited to his individual account in the Commercial Bank of Madera; that the defendant admitted having received the sums of money involved in the amount in dispute; that the checks through and by which said sums were paid to defendant by the deceased were issued on said Commercial Bank and signed by said J. F. Archibald as "President"; that said money has not been returned or repaid to either plaintiff or to the deceased; that the deceased in his lifetime stated to the secretary of the corporation that said loan had been made to said defendant.

We think the evidence and "the presumptions reasonably arising therefrom" strongly tend to establish the material averments of the complaint, or at least sufficiently so tend as to compel, under the principles as declared by the courts, a denial of a motion for a nonsuit. These facts must, as seen, be assumed upon the motion to be true, and, so assuming them to import verity, and giving them full effect, is there any ground for doubting that they are of sufficient probative force to persuade the conclusion that the defendant was indebted to the plaintiff? The fund drawn upon to secure the money received by the defendant is shown without question to have been that of plaintiff. The authority of Archibald to draw the money as indicated is under the proof equally without question or doubt. The receipt of the money by the defendant is an uncontroverted fact in the record, and that the deceased was acting for the corporation and not for himself individually in the transaction with the defendant is an inference or presumption of fact reasonably arising from the manner in which the checks were signed and from the fact

that the fund upon which they were drawn was that of the plaintiff.

It must certainly be admitted that the last-mentioned fact warrants a much stronger inference that the transaction, so far as J. F. Archibald's participation in it was concerned, was by and for the plaintiff, than it would afford in the establishment of respondent's contention that Archibald acted in his individual capacity in loaning the money to defendant. It is true that there is no evidence of the history of the transaction to be found in the records or books of the Archibald Estate, but this circumstance, in our opinion, does not materially detract from the strength of the other testimony, for such omission may or might be accounted for upon reasons perfectly consistent with contractual relations involving the transaction between the plaintiff and defendant. Whatever significance might be attached to the circumstance, either for or against the contention of plaintiff, by the jury or the judge acting as such in the determination of the facts upon the merits of the case, is a matter which cannot concern the decision upon the motion. If the other admitted evidence tends to prove the material allegations of the complaint, the circumstance to which we refer is, as to its effect upon the ruling upon the motion, of no importance in any point of view. The same observations are equally applicable to the point established by the evidence that the president of the corporation was accustomed to liquidating personal or private accounts against himself through checks upon the bank, signed by him as "Pres." There is nothing in this fact necessarily incompatible with the contention that Archibald, in loaning the money to defendant, was acting for the corporation. The findings of fact and conclusions of law filed by the court below were, of course, unnecessary and inappropriate. In fact, the learned judge of the court below, in his written opinion, declares that "while undoubtedly this is an unusual and an apparently unnecessary proceeding, still I feel that under the decision heretofore rendered by the Court of Appeal in *Archibald Estate v. Matteson*, nothing else remains to be done."

The question raised by the motion, as observed, is one purely of law, and we cannot see how the court's findings of facts from the evidence before it can in any degree aid or

strengthen the conclusion reached, for, as we have seen, the motion must admit the truth of the facts shown by the evidence, and by consequence it is the evidence alone upon which we must rely for light to guide us to a conclusion. The question of the credibility of witnesses cannot arise on the motion, except in so far as the rule requires for the purposes of the motion that the testimony shall be given the full benefit of its probative power.

In his written opinion giving his reasons for granting the motion, the learned judge of the trial court says: ". . . It certainly seems to me that it would be an anomalous proceeding, after the trial judge, in any case, tried without a jury, had determined that the evidence was insufficient to support a judgment, to refuse a motion for a nonsuit, and if the defendant then chose to rest upon the evidence offered on behalf of plaintiff, to order a judgment in favor of defendant. If this course were pursued it would be in effect a confession of error in refusing a nonsuit. The case would be entirely different if the trial were had before a jury, whose province it is to decide the facts, for it is unquestionably the settled law of this state that a nonsuit will not be granted when there is any evidence whatever tending to sustain plaintiff's cause of action."

We think the fallacy involved in the reasoning of the learned trial judge lies in the fact of overlooking the extent of the responsibility in the proof of the ultimate fact resting upon the plaintiff. As we have undertaken to demonstrate, the plaintiff must, in support of his averments, offer sufficient proof to make out at least a *prima facie* case. When he has done this, he has presented a case which he is entitled to have submitted to the jury, which is only putting in another form the declaration of the rule that in such a state of the record when plaintiff has closed his case, the granting of a nonsuit is not justified. When he has thus rested his case, he is entitled to know what excuse, justification or defense, if any he has, the defendant may offer against the claims of his complaint. If the defendant elects to offer no proof, it is then for the jury to determine whether or not the plaintiff, upon the merits of the case, as presented, is entitled to a recovery. And in such case there is, of course, abstractly speaking, no presumption to be indulged as to the truth or falsity of the

testimony as given, for, the case being then submitted upon its merits, the judge or jury trying the facts may accord to the evidence such weight as it, not arbitrarily but in subordination to rules of law governing that determination may decide that it is entitled to, or may give it no weight whatever.

The trial judge is also in error in the intimation in his opinion that there is any difference in the power and duty of a court, upon a motion for a nonsuit, merely for the reason that a jury has been waived by the parties and the questions of fact are to be submitted to the arbitrament of the court. The motion is not, of course, addressed to the court, *sitting as a jury*, when the latter has been waived, but is a question of law alone submitted to the judgment and decision of the court, as such, and the jury, or the court acting in that capacity, has no more concern with it than it could have with the decision of a question upon demurrer to a complaint or other pleading.

In the case of *Goldstone v. Merchants' etc. Co.*, 123 Cal. 631, [56 Pac. 778], the court says that "the rules as to a nonsuit are the same whether the trial is by the court or by the jury." When, therefore, a motion for a nonsuit is submitted to the court, acting also as a jury, it is not for the court to base its determination of the motion upon what it might do in dealing with the facts as a jury, but solely upon the proposition of whether the facts as proved are such as to make out a *prima facie* case. If the facts upon their face, when plaintiff rests, are sufficient to justify the submission of the case to a jury, then they are, of course, enough to submit to the court when acting as a jury, notwithstanding the court's opinion that, upon the merits, they are not sufficient to entitle plaintiff to a recovery, and, under such circumstances the motion should be denied.

For the foregoing reasons the judgment is reversed.

Burnett, J., and Chipman, P. J., concurred.

[Civ. No. 284. Third Appellate District.—April 25, 1907.]

R. S. MINER, Respondent, v. T. B. RICKEY, Appellant.

ACTION FOR SERVICES—AMENDMENT TO ANSWER—DISCRETION—SETTLEMENT WITH PARTNERSHIP—REFUSAL NOT PREJUDICIAL.—In an action for services, although a proposed amendment to the answer to set up a settlement between plaintiff and a partnership of which defendant was a member, and payment in full, might well have been allowed so as to present the case upon its merits, yet it cannot be held that the court abused its discretion in refusing it, where its action was not prejudicial, it appearing that the action was tried upon the theory that the settlement was in issue.

ID.—INDIVIDUAL ACTION—EVIDENCE—PARTNERSHIP—JOINT OBLIGATION—INSTRUCTION—MATERIAL VARIANCE.—In an action for services against a defendant individually, where defendant's evidence, received without objection, tended to prove that any liability in favor of plaintiff was against a partnership of which defendant was a member, the defendant was entitled to an instruction that if the jury found that the services were rendered at the request of the defendant acting as a member of the partnership to the plaintiff's knowledge, their verdict should be for the defendant. In such case the obligation would be joint, and the instruction is addressed to the question of a material variance between the complaint and the evidence.

ID.—HEARSAY EVIDENCE—PREJUDICIAL ERROR.—It was prejudicial error to admit hearsay evidence either to prove the value of plaintiff's services, or to corroborate the testimony of plaintiff that he was employed by the defendant, or to show a conversation with the register of the state land office, to excuse delay in a suit for years that should have been dismissed on motion.

APPEAL from a judgment of the Superior Court of Mono County. Clark Howard, Judge.

The facts are stated in the opinion of the court.

Parker & Parker, Alfred Chartz, Charles C. Boynton, and James F. Peck, for Appellant.

Richard S. Miner, for Respondent.

BURNETT, J.—The action was brought for legal services and was tried before a jury. The verdict was in favor of the plaintiff for the sum of \$480.00. The appeal is from the judgment on a bill of exceptions.

The first point urged in the brief of appellant for reversal is based upon the ruling of the court in denying the motion to suspend the trial until the determination of another action pending in the circuit court of the United States. We understand, however, from the oral argument that appellant has abandoned this position and therefore we shall not discuss it.

Complaint is made of the refusal of the court to allow the defendant to amend his answer. The motion to amend, it is claimed, was promptly made at the close of plaintiff's case, and was based upon the testimony of plaintiff himself. By the amendment it was proposed to set up a "settlement of all the claims and demands existing between the plaintiff and Richard Kirman and T. B. Rickey as copartners, in which settlement a balance of account was struck between the plaintiff and defendant and in which settlement there was found to be due and owing from the said Richard Kirman and T. B. Rickey as copartners to the plaintiff the sum of \$158.50, which said last-mentioned sum was then and there paid by defendant to the plaintiff and received by plaintiff in payment and discharge of the said balance so then found to be due by said settlement." The pertinency of defendant's application to amend is pointed by his contention that if he incurred any liability at all to plaintiff it was solely as a member of the firm of Kirman & Rickey, a copartnership. As often held, the power of the court should be liberally exercised in allowing amendments so as to present causes upon their merits, and yet where no abuse of discretion is shown the action of the lower court in denying a motion to amend should not be disturbed by the appellate tribunal. While the motion in the present instance might well have been granted, yet it is manifest that the ruling did not prejudice the substantial rights of the defendant, as the cause was tried upon the theory that the settlement was in issue.

The criticism by appellant of the instructions given by the court and found at folios 933 and 936 of the transcript we deem inapt and unjustifiable. We think there is no uncertainty in the expression, "all accounts prior to said settle-

ment." It obviously refers to all services for said firm performed by plaintiff prior to said settlement. It would not be contended that the settlement would affect any services rendered thereafter or performed *at any time* for the defendant *individually*.

Again, it is urged that the instruction defining a partnership liability and also the following should have been given to the jury: "This is an action against T. B. Rickey individually and if the jury find from the evidence that the items sued upon in this action were rendered by plaintiff and that such services were rendered by plaintiff at the request of the defendant, who at the time of making the request was acting as one of the copartners of a copartnership composed of Richard Kirman and T. B. Rickey, and that the plaintiff knew at the time of such request that the defendant's request was made as such copartner for the copartnership, then your verdict should be for the defendant." To appreciate the force of this contention it should be remembered that the complaint was framed upon the theory that plaintiff was employed by and rendered services for the defendant individually. The defendant relied simply upon the denials in his answer of the material allegations of the complaint. No affirmative defense was set up except one in relation to the motion to postpone the action, which at the trial was withdrawn. The evidence introduced by plaintiff was sufficient to support his claim. Defendant's evidence, received without objection, tended to prove that whatever liability existed in favor of plaintiff was against a partnership of which the defendant and the said Richard Kirman were the members. In this state it has been held that when "several persons contract together with the same party for one and the same act they shall be regarded as jointly and not individually or separately liable in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promisors. Especially is this the rule as to the legal liability of partners upon their partnership obligations." (*Harrison v. McCormick*, 69 Cal. 620, [11 Pac. 456], and cases cited.) It might be contended that where defendant claims as a defense that the obligation is joint and not separate, he should plead it affirmatively, but the obvious answer here is that it was treated as though an issue in the case. The evi-

dence of the partnership liability was received without objection, and hence defendant was entitled to the instruction to which we have referred, as it was addressed to the question of a material variance between the complaint and the evidence.

Again, hearsay testimony of a prejudicial nature was admitted over the objection of defendant. The most serious error in this respect is in relation to the testimony of one David Hays. Nearly all of his testimony was improperly admitted, but we shall refer to only a few of the questions and answers disclosed by the record. He was asked: "Were you authorized by Turner and Dobin, the plaintiffs in these actions, to employ an attorney to help in the prosecution of these cases?" He answered substantially that he was. Again: "Now state what you did do, if anything." The witness answered: "Well, I went to different persons that were practicing law to engage them to act in cases for the association." Mr. Miner: "To whom did you go?" Answer: "Well, I went to Judge Goodall . . . and Mr. Miner, the plaintiff." Q. "Now, how often did you come to me and consult me in that matter?" A. "I think I may have gone to you, one time or another, five or six times, and you stated 'I don't know as I have the right—'" Mr. Miner: "State what I said generally." A. "Employed on the other side in some of those instances of which I speak by Kirman & Rickey." Mr. Miner: "Was any amount, was any sum mentioned, that I could get, if you recollect, providing I would prosecute the land cases?" A. "Well, I suggested that you might make a few thousand dollars by serving the sheep men association, that we needed you. You said you could not take any case."

It is idle to argue the incompetency of the foregoing testimony. It is hearsay pure and simple. The effect it might have upon the jury it is easy to surmise. The plaintiff understood its significance, because he made three futile efforts to induce the trial judge to admit it, but at the fourth attempt his pertinacity and importunity were finally rewarded—but upon what ground it does not appear. Plaintiff, in the oral argument, admitted that the ruling is somewhat questionable, but suggested that the evidence might be admissible to prove the value of his services. But it is clear that it was not addressed to the issue as to the reasonable value of his services. But if it related to that matter it would still be

hearsay and inadmissible. The value of services cannot be shown by declarations of third persons not under oath. The evidence was undoubtedly offered to corroborate plaintiff's testimony as tending to increase the probability that he was employed by defendant. We cannot say, of course, what weight was attached to this testimony by the jury, but by its admission, in the somewhat turgid phraseology of appellant, "every rule of evidence was violated and the defendant's rights ruthlessly disregarded."

Mr. Joe A. Brown, another witness, was allowed also over objection to testify to a conversation with the register of the state land office, in which he stated that the "interest on school lands sometimes was not demanded for a number of years, and there couldn't only be two reasons for that; one would be that the land had not been listed to the state, and the other that there might be suits pending." This evidence was offered for the purpose of rebutting any unfavorable inference that might be drawn against plaintiff from the fact that the cases against defendant and in which plaintiff claims to have performed the services that are the basis for the present suit were allowed to remain on the calendar undisposed of for years when upon motion they could have been dismissed. The objection to this evidence likewise should have been sustained.

For the reasons stated, the judgment is reversed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 274. Third Appellate District.—April 29, 1907.]

W. H. ADAMS, Appellant, v. ARTHUR THORNTON, Respondent.

CLAIM AND DELIVERY—CROPPING LEASE—TENANCY IN COMMON—LAW OF THE CASE.—In an action of claim and delivery, where the court decided on a former appeal that the instrument of lease between the parties must be deemed only a cropping contract, and that by virtue of its provisions the parties were cotenants in the fruits raised during the time of the contract, and that each has an equal right with the other to the possession of the fruit, the construction of the contract is the law of the case upon a second appeal.

ID.—RIGHT TO NONSUIT—DISTINCT EVIDENCE—LAW OF CASE INAPPLICABLE.—The decision upon the former appeal that the defendant was entitled to a nonsuit is not the law of the case upon the second appeal, where the evidence at the second trial is so distinct as to render the granting of a nonsuit thereat erroneous.

ID.—REPLEVIN MAINTAINABLE WHEN SHARE MAY BE ASCERTAINED.—Where the personal property held in cotenancy is readily divisible by weight or measurement into portions absolutely alike in quality and value, and an equal division thereof was in fact made by the cropping tenant, placed in separate piles, each pile having a separate letter, and the lessor's share was tendered to him and refused, and the lessor took possession of all the fruit and refused to return the tenant's share upon demand, replevin by the cropping tenant may be maintained to secure his share of the crop from the lessor.

ID.—ARGUMENT UPON APPEAL—POINT MADE IN REPLY BRIEF.—The fact that the point was first made by appellant in his reply brief that the law of the case does not apply where the plaintiff's evidence is different upon the new trial does not preclude the decision of the point by this court.

APPEAL from a judgment of the Superior Court of San Joaquin County. Frank H. Smith, Judge.

The facts are stated in the opinion of the court.

Nicol & Orr, and J. M. C. Murphy, for Appellant.

Louttit & Middlecoff, for Respondent.

BURNETT, J.—This action was brought in replevin to recover one hundred and eighty-six and three-fourths sacks of dried apricots or their value in case a delivery could not be had, together with damages for their detention. When plaintiff rested, a motion for nonsuit was made and the court granted the motion "solely for the reason that the court feels bound by the decision of the Appellate Court for the Third District rendered on the prior appeal in this cause, to hold that plaintiff and defendant are tenants in common of the property described in the complaint, and that this court should grant a nonsuit on such grounds."

In the decision by this court on the former appeal it was held that "While the agreement set out and under which the parties were operating is called therein a lease, yet un-

der the authority of *Bernal v. Hovious*, 17 Cal. 542, [79 Am. Dec. 147], it must be deemed only a cropping contract, and the parties are cotenants in the fruits raised during the time of the contract, and each has an equal right with the other to the possession of the whole of said fruit, and, under the general rule, neither can maintain a suit against the other for the possession of the fruit," and the judgment was reversed on the ground that the motion for a nonsuit should have been granted.

It is claimed by respondent that the aforesaid decision of this court is the law of the case and that we must affirm the action of the trial court in granting the nonsuit in consonance with the mandate of the appellate court.

Among the decisions declaring the effect and scope of such a judgment as bearing upon the subsequent history of the litigation, the cases of *More v. Calkins*, 95 Cal. 436, [29 Am. St. Rep. 128, 30 Pac. 583], and *McGraw v. Friend & Terry Co.*, 133 Cal. 589, [65 Pac. 1051], are directly in point. In the former, as we find in the syllabus, it is held that "The construction placed upon a deed of trust by the Supreme Court in its decision reversing the judgment and remanding the case for a new trial . . . is the law of the case and the question of its correctness will not be considered upon a second appeal."

And so here, we cannot call in question the construction placed by this court in the former appeal upon the written contract between the parties. We are bound to hold that it constituted a cropping contract, and that by virtue of its provisions the parties became tenants in common in and to all the fruit produced, which was the subject matter of said contract.

The only remaining question is whether the determination by the appellate court that claim and delivery would not lie in view of the evidence disclosed by the record and that the nonsuit should have been granted at the former trial precludes us from any inquiry into the evidence taken at the second trial to find the absence of support for the action of the court in granting the motion for a nonsuit. The proper solution of this question depends upon the consideration whether the evidence was the same or substantially the same at both trials. In the McGraw case, *supra*, it is said that "in an action for negligence a motion for a nonsuit on the ground that

the evidence for the plaintiff establishes his contributory negligence, so as to preclude a recovery, raises a question of law; and the decision upon a former appeal, that a nonsuit should have been granted upon that ground, is the law of the case upon a second appeal *when the evidence for the plaintiff does not warrant a different conclusion.*" And in *Sharon v. Sharon*, 79 Cal. 633, [22 Pac. 26, 131], it is said that "The rule has no application when the facts presented on the second appeal are materially different from those on which the decision was rendered." (Citing *Nieto v. Carpenter*, 21 Cal. 454; *Meeks v. Southern Pacific R. R. Co.*, 56 Cal. 513, [38 Am. Rep. 67]; *Cross v. Zellerbach*, 63 Cal. 623, and *Dodge v. Gaylord*, 53 Ind. 365.)

Turning to the record before us we find the evidence at the latter trial materially different from that at the former. One important circumstance is disclosed which was not presented before. This constitutes a significant feature which cannot be ignored in the determination of the question whether the action can be maintained between tenants in common. It is this: After the fruit was cured and packed, it was divided *into two equal parts* of the same grade and value and placed *in separate piles* in the house occupied by plaintiff. In view of this distinction between the two trials was the court below justified in granting the motion for a nonsuit? The plaintiff testified: "I was in the occupation and possession of those lands during the year 1902 and had been for two years prior thereto. I had been farming them and caring for orchards thereon. I know the fruit that is mentioned in the complaint. It was grown on that orchard during the year 1902. I picked, cut, dried and cured it. When it was cured I sacked it in fruit sacks secured and paid for by me. After it was cut, cured and sacked I divided it into two equal parts and piled it in a house on the premises occupied by me. There was a division of the dried fruit into separate piles, each pile having a separate letter. The sacks were all of the same weight and the same value. They were piled so that each pile was distinguishable from the other. After the fruit had been divided and piled as I have stated, I offered to deliver Mr. Thornton the one-half thereof. He refused to accept it. After I had offered to deliver it to him and while I was away, he came and took all the fruit and hauled it away. I never got possession of any of it again.

. . . I demanded the return of it, and Thornton refused to return it. From the time it was picked it remained in my possession until it was taken away by Thornton."

In *Balch v. Jones*, 61 Cal. 237, it is said: "An action of replevin or of claim and delivery of the common property is not maintainable by one tenant in common against another, nor is trover, unless there has been such a loss, destruction or disposal of the property as amounts to a conversion; or the property is divisible in its nature and ascertainable by measurement, weight or count. In such a case a tenant in common may demand of his cotenants, having possession of the whole, his share, and on a refusal or conversion, he may sue in trover."

In *Wattles v. Dubois*, 67 Mich. 313, [34 N. W. 672], it is held that "the refusal by a tenant to deliver to his landlord his half of the unthreshed grain grown on the leased premises, is a waiver of the tenant's right to possession for the purposes of such delivery, and the landlord has a right to the immediate possession of his half and may maintain replevin therefor."

Here, it will be observed, the defendant refused to accept his one-half which plaintiff offered to deliver.

In *Sutherland v. Carter*, 52 Mich. 473, [18 N. W. 224], the court said: "The plaintiff was tenant in common of the grain, and after it was threshed she was entitled to her one-half thereof and it was Carter's duty to deliver it to her when she demanded it upon the farm. It was her property, and the action will lie in such a case under the facts found in this record." (Citing a large number of cases.)

In *Morgan v. Hedges*, 4 Colo. 531, this language is used: "The stipulations in the articles of agreement that appellant, Morgan, should sell the products of the ranch and keep a full account of all receipts and disbursements, involves an agreement for their possession to that end. Where tenants in common of chattels agree that one shall have exclusive possession of the chattels, the tenant so entitled may maintain replevin against his cotenant."

In the case at bar the agreement provided for the possession of the fruit by plaintiff and his delivery of one-half of the dried fruit to defendant. (See, also, *Newton v. Gardner*, 24 Wis. 232.)

In *Hurff v. Hires*, 40 N. J. L. 588, [29 Am. Rep. 282], it is declared: "There is a clear and well-settled distinction between the individual rights of several parties in goods of uniform kind and quality, and in those in which there is no uniformity in these respects. It is recognized in cases of a cotenancy of personal property, readily divisible, by weight or measurement, into portions absolutely alike in quality and value. In such cases, either tenant may take his proper proportion, and it will be regarded as a proper severance so long as he does not take more than his share; but the rule is otherwise in case of property not severable; in that event, the partition must be by agreement, or proceeding in equity."

In *Cobbey on Replevin*, section 238, the rule is stated as follows: "An action will not lie for an undivided interest in a chattel, nor can such tenant in common sue alone as against a stranger in possession. The plaintiff must have a right to a whole and entire interest. A different rule prevails where the property can be separated into aliquot parts, and the interest is easily separable, as one-third of sixty bushels of wheat. Where corn in a single pile or crib, owned by two tenants in common, is in the exclusive possession of one of such tenants, but both being equally entitled to the possession thereof, the other joint owner, if his cotenant refuses a division when properly demanded, may recover his portion of the grain by replevin."

"Replevin will lie for separate and distinct articles capable of identification and not undivided portions of separate lots." (*Phipps v. Taylor*, 15 Or. 484, [16 Pac. 171].)

It would seem that in the present instance the evidence brings the plaintiff clearly within the exception to the general rule that one tenant cannot maintain an action for replevin against his cotenant. All the property under the agreement was rightfully in the possession of plaintiff. He had divided it equally and one part belonged to him. He offered to deliver to defendant the portion to which he was entitled, and defendant refused to accept it. During the absence of plaintiff defendant comes and takes all the property and refuses to surrender the one-half when it is demanded of him. If these facts do not show cause to institute the action, it is difficult to conceive what would be sufficient. It is well settled that a motion for a nonsuit is in the nature of a demurrer to the evidence, that the evidence must be

viewed most favorably for the plaintiff, and if it tends to prove all the material allegations of the complaint the motion should be denied. It may be admitted that the testimony of plaintiff at the former trial is not altogether consistent with his testimony at the latter, but the question of the credibility of the witness is not involved here, and it is to be remembered that the want of harmony in the testimony of a witness at two separate trials may of itself render inapplicable the doctrine of "the law of the case."

No doubt the learned trial judge would have denied the motion if he had not felt constrained by the former decision in the case, but we think the evidence is materially different and hence that the motion should have been denied.

The judgment is reversed.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 28, 1907, and the following opinion was then rendered thereon:

BURNETT, J.—Respondent's petition for a rehearing seems to proceed upon the theory that the affirmative defense set up in the answer was established at the trial. The truth is that plaintiff was the only witness examined and his evidence tended to prove the allegations of the complaint and not any allegation of the answer inconsistent therewith. Upon the trial of all the issues in the case it may be that defendant will be entitled to judgment, but we still think that the motion for a nonsuit was improperly granted. We are not inclined to the view that we should not consider the contention that the law of the case is not applicable because the point was not raised in the opening brief. We see no reason why we should not consider it, though it was made, not in anticipation of defendant's argument but in answer thereto.

The petition for a rehearing is denied.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 24, 1907.

[Crim. No. 324. Third Appellate District.—April 29, 1907.]

CHARLES W. KITTS, Petitioner, v. SUPERIOR COURT
OF NEVADA COUNTY, and F. T. NILON, Judge, Re-
spondents.

CRIMINAL LAW—INDICTMENT—VALIDITY—DISQUALIFICATION OF GRAND JURORS.—The validity of an indictment is not affected by the fact that one of the grand jurors was disqualified because he had served as and been discharged as a juror in the superior court within one year, nor by the fact that two others were disqualified because they were not assessed upon the last assessment-roll of the county.

Id.—CONSTRUCTION OF PENAL CODE—DISQUALIFICATION OF GRAND JURORS—GROUNDS OF MOTION TO SET ASIDE INDICTMENT.—The disqualifications of individual grand jurors are those prescribed in section 896 of the Penal Code, and do not include the disqualifications of jurors generally urged in this case, and prescribed in the Code of Civil Procedure; and under the maxim "*Expressio unius est exclusio alterius*," it seems the conclusion is warranted that a motion to set aside an indictment under section 995 of the Penal Code for disqualification of individual grand jurors is limited to the grounds specified in section 896 of that code.

Id.—NATURE OF GRAND JURY—DE JURE BODY—DISQUALIFIED GRAND JURORS ACTING UNDER COLOR OF RIGHT—PROCEEDINGS NOT VITIATED. The grand jury is a *de jure* body created by the constitution; and one who, having been regularly summoned and impaneled as a grand juror, and who exercises the duties thereof, though thereafter discovered to be disqualified by some provision of law, serves under color of right; and "upon principles of policy and justice," his acts in such capacity should not be held to invalidate the whole jury or any proceedings had by it in which he participated.

Id.—REGULAR NUMBER IMPANELED—SOLE OBJECTION TO NUMBER.—If the requisite number of grand jurors have been regularly summoned and impaneled in the first instance, no objection to number can thereafter be urged to question the validity of an indictment, except where it may appear that twelve of such jurors have not concurred in finding it.

Id.—PROHIBITION—VALIDITY OF INDICTMENT.—Whatever ground of criticism may be urged against an indictment under a general or special demurrer, where it attempts to set forth a public offense, its validity cannot be questioned under a petition for prohibition addressed to the jurisdiction of the court.

PETITION for writ of prohibition to the Superior Court of Nevada County. F. T. Nilon, Judge.

The facts are stated in the opinion of the court.

Charles W. Kitts, and A. M. Seymour, for Petitioner.

George L. Jones, District Attorney, for Respondents.

HART, J.—The grand jury of Nevada county, on the twenty-fourth day of November, 1906, returned and caused to be filed in the superior court of that county an indictment against the petitioner for the crime of assault by means and force likely to produce great bodily injury upon the person of one Martin Shoebridge. Thereafter petitioner moved the respondents to set aside said indictment upon the grounds that certain members of said grand jury were disqualified under the law from acting as such, and at the time of the presentation of said motion evidence was offered which it is claimed supported the charge of the disqualification of such jurors. The motion was denied by respondents, and thereupon the petitioner was required to answer the indictment.

It is claimed that by reason of the alleged disqualification of said jurors the indictment was not found, presented and filed according to the requirements of law, and that the same does not therefore confer upon respondents jurisdiction to try petitioner for the offense charged against him in said alleged indictment.

The petitioner asks that respondent be prohibited from trying him upon said alleged indictment, and commanded to desist and refrain from taking further proceedings in the case. The jurors who are alleged to have been disqualified from serving as members of said grand jury are J. H. Nile, W. H. Hughes, and E. G. Sukeforth. It is claimed that said Sukeforth was disqualified because he "had served in and been discharged as a juror by a court of record of this state, to wit: the Superior Court of the County of Nevada, State of California, within a year of the time that he was summoned and impaneled to act as such grand juror, and within a year of the finding and filing of the said alleged indictment," and

that said Nile and Hughes were not competent to act as grand jurors for the reason that they were not assessed on "the last assessment-roll of said Nevada County for the year 1906, on property owned by them, standing in their names, or at all." It is alleged that the juror Hughes is not thus assessed "except there is an assessment on said last assessment-roll to 'Hughes Bros.,' which may or may not be property belonging to said William H. Hughes." It is also averred that "said alleged indictment fails to state any public offense against your petitioner."

As to the first proposition, that the juror Sukeforth was not competent to act as a grand juror because of having served as a juror and having been discharged as such within a year of the time that "he was summoned and impaneled to act as such grand juror, and within a year of the finding and filing of said alleged indictment," it is only necessary to say that the supreme court has recently, in the case of *Ex parte Ruef*, on *habeas corpus*, 150 Cal. 665, [89 Pac. 605], ruled adversely to petitioner's contention.

In that case the court says, speaking of the same objection as is made here: "We are of the opinion that this does not affect the validity of an indictment found by the grand jury. The Penal Code enumerates the grounds upon which an indictment may be set aside. (Pen. Code, sec. 995.) One of these grounds is 'any ground which would have been good ground for challenge to any individual juror.' Penal Code, section 896, provides for a challenge to an individual grand juror for six specific grounds *only*. The particular incompetency here relied on is not included. We think that the legislature, in declaring that persons who had been discharged as jurors within a year should not be competent, and at the same time denying to a defendant indicted by a grand jury including one or more such persons any remedy by way of motion or challenge, in effect provided that if the statutory rule prohibiting the service of such persons were not obeyed, the departure should not invalidate any indictment found."

The point that the grand jury was not a legally constituted body because jurors Nile and Hughes were not assessed upon the last assessment-roll of the county on property belonging to them, and therefore could not return a valid indictment, cannot, we think, be maintained. The law provides that the

grand jury shall be composed of nineteen members (Code Civ. Proc., sec. 192), twelve of whom may find an indictment. (Pen. Code, sec. 940.) One of the prescribed qualifications of a grand juror is that he shall be "assessed on the last assessment-roll of the county . . . on property belonging to him." (Code Civ. Proc., sec. 198.) Of course, it is true that a person not possessing the general qualifications for a juror required by section 198, Code of Civil Procedure, is not competent to act either as a grand or petit juror in any case. Under the system in vogue in California prior to the adoption of our present constitution the only mode authorized for the inauguration of a prosecution of an ordinary felony charge was by indictment by a grand juror, a necessary prerequisite to which was a preliminary hearing of the charge by a magistrate and an order holding the accused to answer before said body. By that method of proceeding, the accused, having been held to answer, was expressly given by the law the right, and thus afforded an opportunity of interposing in open court a challenge to the panel of grand jurors or of examining them individually for the purpose of exercising any challenge of their right upon any ground prescribed by the statute to inquire into or act upon his case. Since the adoption of the present constitution, however, the procedure with regard to the initiation of prosecutions for felony is essentially different from the former manner of proceeding. Under our present system, as established by the constitution of 1879, and which it is safe to say is familiar to people generally, all offenses theretofore prosecuted by indictment may be prosecuted by information after an examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law. (Const., art. I, sec. 8.) The effect of this provision of the constitution is, as may readily be seen, that an indictment by a grand jury may be found for a felony without a preliminary examination of the charge by a magistrate, and the accused, therefore, deprived of an opportunity, as formerly accorded to him, of examining the inquisitors as to their general and special qualifications to act as such before they proceed to the examination of his case. The result is, in such a case, that the accused has but one remedy, which is exercisable only

after the indictment is found and filed, and is in the nature of a motion to set it aside for certain specified reasons prescribed by section 995 of the Penal Code. Among the grounds enumerated by that section as requiring the setting aside of an indictment is "any ground which would have been good ground for challenge, either to the panel or to any individual grand juror." The grounds of challenge to the panel are set forth in section 995 and the cause of challenge to an individual grand juror prescribed in section 896 of the Penal Code. The incompetency of the grand juror for not possessing the qualification mentioned in subdivision 4 of section 198 of the Code of Civil Procedure is not embraced within the grounds prescribed in either section 995 or 896 of the Penal Code. There can be no doubt that, under the system which prevailed under the constitution preceding the present one, if an examination of the grand jurors disclosed that any or all of them were wanting in any of the general qualifications required in them by law, or by section 198 of the Code of Civil Procedure, if at that time that section existed as now, such juror or jurors could have been successfully challenged upon such ground. It would seem, from adjudications of analogous questions by the courts, that where, as in this case, a section of the code expressly mentions certain grounds upon which an indictment may be set aside, and said section does not include in such grounds certain grounds prescribed in another section or code disqualifying a person from acting as a grand juror, the section involving the grounds upon which the indictment may be set aside is intended by the legislature as a limitation of the grounds as to which an indictment may be set aside. Certainly the rule of construction expressed by the maxim "*Expressio unius est exclusio alterius*," would warrant this conclusion. But it is not necessary to base our conclusion that petitioner's position on this point is untenable upon this reason.

Counsel upon both sides of this case have in their briefs elaborately, interestingly and instructively discussed all the points which could conceivably be brought to bear upon the main point in the case, to wit, whether, for any of the reasons suggested by petitioner, the superior court of Nevada county is without jurisdiction to try said petitioner under the indictment of which complaint is made. But we are of opinion that

the point which is under discussion has been decided against the contention of petitioner in a number of opinions filed by the supreme court. The case of *People v. Simmons*, 119 Cal. 1, [50 Pac. 844], while not directly in point, is valuable, more particularly because the court adopts the reasoning and authorities cited in the case of *People v. Hecht*, 105 Cal. 621, [45 Am. St. Rep. 96, 38 Pac. 941]. The last-mentioned case was where a question arose as to the qualifications of certain members of a board of freeholders, elected to frame a new charter for the city and county of San Francisco. By proceedings in *quo warranto* it was attempted, not only to oust two of the elected members of the board because they had not been, as required by the constitution in such case, electors of the city for which they were elected for a period of five years preceding their said election, but to have declared invalid the entire board because, by reason of the disqualification of two of the members so elected, the full number of fifteen qualified electors had not been elected as such freeholders. The supreme court, in a characteristically able opinion by Judge Niles Searls, then a commissioner, held that under the facts as alleged in the complaint and admitted to be true by the demurrer, the two alleged disqualified freeholders were in fact disqualified and could not, therefore, act as such, on the board, but that the fact of their disqualification did not invalidate the board; that it was a legally constituted body, with full power to perform the duties designed by the constitution and for which it had been elected and organized. Among other things this learned judge says: "An interpretation which holds that the ineligibility, or death, or unwillingness to act of a single member thus selected invalidates the entire election, would work great hardship, and tend to thwart the will of the electors in many instances, and should not be indulged unless rendered imperative by the mandate of the constitution. The same constitution (art. XI, sec. 5) provides that the legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of 'boards of supervisors,' etc. Other portions of the constitution provide for a Supreme Court, 'which shall consist of a Chief Justice and six Associate Justices.' Again, 'the Senate shall consist of forty members, and the Assembly of eighty members.' It would, we think, hardly be contended

that because the constitution provides for a *board of supervisors* that an election for supervisors, in which a single member elected was disqualified, would either invalidate the election of other members, or prevent their organizing and acting as a *board*. Like considerations apply to the election of members of the senate and assembly, and to the election, organization and action of the Supreme Court." Further on in the opinion it is said: "Again, the office of freeholder is created by the constitution. It is a *de jure* office. When Hellman and Bourn were elected by a plurality of the qualified electors, received their certificates of election and qualified and participated in the action of the board, they were there under color of office and presumptively entitled to the office. They were *de facto* officers in the discharge of the duties of a *de jure* office, and as such their acts, while they remained such, were as valid and binding as those of *de jure* officers. There must be a *de jure* office to be filled before there can be a *de facto* officer. If the former exists, and the latter holds it under and pursuant to a regular commission purporting to empower him to act, his acts in such office, until his right thereto is judicially determined, the law holds upon principles of policy and justice to be valid so far as they involve the public and third parties."

An officer *de facto* is defined to be "one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons where the duties of the office were exercised: 1. . . . 2. . . . 3—under color of a known election or appointment, void because the officer was not eligible, . . . such ineligibility . . . being unknown to the public." (*State v. Carroll*, 38 Conn. 449, [9 Am. Rep. 409].)

We think the principles discussed in the Hecht case apply here. In fact, it is, as we have seen, so expressly declared in *People v. Simmons*, *supra*. The grand jury is a *de jure* body created by the constitution. (Const., art. I, sec. 8.) One who, having been regularly summoned and impaneled as a grand juror, and exercises the duties thereof, although thereafter discovered to be disqualified by reason of some provision of the law, serves under color of right, and "upon principles of policy and justice," his acts in such capacity should not be held either to invalidate the whole jury or any

proceedings had by it in which he participated. Any number of cases can be found to the point that where a grand jury has been summoned and impaneled as required by law the death of one of the members after such impanelment, thereby reducing the number below that required by the statute, does not render invalid the jury as it remains nor vitiate any proceedings properly coming before it. (*People v. Hunter*, 54 Cal. 65.) If the requisite number, having been regularly summoned, is sworn or impaneled as grand jurors in the first instance, no objection as to number can be urged questioning the validity of an indictment except where it may appear that twelve of such jurors have not concurred in finding it. Upon this point it is our conclusion that the fact that jurors Nile and Hughes may not have been assessed on the last assessment-roll of the county on property belonging to them does not operate to invalidate the indictment. The case of *People v. Leonard*, 106 Cal. 302, [39 Pac. 617], is not an authority supporting petitioner's contention. There the question was whether or not, when impaneling a grand jury, and after excuses allowed there were remaining twenty jurors from whom to select the required number, two of whom, in reply to questions by the district attorney, declared they were not assessed on the last assessment-roll of the county, upon the excuse of such jurors by the court after challenge by the district attorney, and the ordering of a special venire for two persons from whom to complete the panel, was the proper procedure under the provisions of the code upon the subject. The court held that the course pursued was regular and proper.

The third and last point relied upon is that the indictment does not state facts sufficient to constitute a public offense.

Without passing upon the question of whether or not the indictment might in some respects be amenable to criticism under either a general or special demurrer, it may be said that the offense charged therein is sufficiently set forth to withstand attack in this proceeding.

The purpose of the remedy here sought is, like that afforded by the writ of *habeas corpus*, solely to determine the question of jurisdiction, and consequently the principle declared upon a similar point in the case of *Ex parte Ruef*, on *habeas corpus*, 150 Cal. 665, [89 Pac. 605], is pertinent here. In that

case the court says: "On *habeas corpus* the inquiry into the sufficiency of an indictment is limited. We think the true rule is that where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on *habeas corpus*."

The indictment here, it may be said, certainly makes "an attempt to state an offense," and with equal certainty fully meets the test, so far as a proceeding of this character is concerned, laid down in the Ruef case.

A large array of authorities is cited by the learned counsel for petitioner in the discussion of the numerous points growing out of the main contention. The briefs on both sides are voluminous and able, showing, as we have before suggested, commendable and assiduous industry, but it would only compel unnecessary prolixity to undertake to notice all the points discussed, many of which only collaterally affect the principal question in dispute, or to enter upon the laborious task of distinguishing, as can without difficulty be done, the many cases offered in support of the contention of petitioner, from the one at bar. We have given careful attention to the record, and to the arguments, oral and written, and find no reason for entertaining any doubt that the respondents have jurisdiction to try petitioner upon the charge alleged in the indictment.

For the foregoing reasons, the order to show cause will be discharged, and the application for peremptory writ of prohibition denied.

Burnett, J., and Chipman, P. J., concurred.

[Crim. No. 57. Second Appellate District—April 30, 1907.]

Ex Parte JULIA A. WOOD on Habeas Corpus.

STATE REFORM SCHOOL—IMPROPER COMMITMENT OF ADULT—HABEAS CORPUS.—Only minors between the ages of eight and eighteen, when found to be incorrigible, can be committed to the Whittier State Reform School. Where an adult female has been committed thereto, as being incorrigible, she must be discharged upon writ of *habeas corpus*.

APPLICATION for writ of *habeas corpus* to the superintendent of the State Reform School.

The facts are stated in the opinion of the court.

Hugh J. Crawford, for Petitioner.

J. C. North, Deputy District Attorney of Los Angeles County, for Respondent.

SHAW, J.—Application made by Lawrence D. Wood on behalf of his daughter Julia A. Wood for a writ of *habeas corpus*, to be directed to the superintendent of the Whittier state school.

On March 16, 1907, a complaint was filed in the superior court of Los Angeles county by one A. C. Dodd, wherein it was alleged that Julia A. Wood, a female, was a minor under the age of eighteen years; that she was guilty of incorrigible conduct; and praying that she be committed to the Whittier state school. At the hearing, had on the day of filing the complaint, it was by the court adjudged that said Julia A. Wood was an incorrigible under subdivision 1 of section 20 of an act of the legislature of California entitled, "An Act to establish a State Reform School for juvenile offenders, and to make an appropriation therefor," approved March 11, 1889, and the acts amendatory thereof, and that she was a fit subject for commitment to said school; and thereupon the court, on said sixteenth day of March, 1907, made an order committing her to said Whittier state school until she arrived at the age of twenty-one years.

Among other grounds urged in support of the issuance of the writ, it is contended that said Julia A. Wood was not a minor at the date of said adjudication and commitment, and hence the court had no jurisdiction to order her committed to said institution as an incorrigible under subdivision 1 of section 20 of said act, which is as follows: "It shall also be lawful for the said board of trustees, under such rules as they may prescribe, to receive into the care and guardianship of said institution, whenever it may be convenient so to do, minors between the ages of eight and eighteen years, committed to custody in any of the following modes: 1. Minors committed by any judge of a Superior Court of this state on the complaint, in writing, filed and due proof thereof made by the parent or guardian of such minor, showing that by reason of the incorrigible and vicious conduct or nature of such minor, he is beyond the control and power of such parent or guardian, and that from a regard for the future welfare of such minor and the protection of society, it appears that such minor should be placed in the care of such institution."

It will thus be seen that it is only minors between the ages of eight and eighteen years who may be lawfully received under the protecting care of said institution by said board of trustees, with the further provision contained in subdivision 1, which makes it applicable to minors committed as therein provided. Clearly, the court had no right, under this provision, to adjudge said Julia A. Wood guilty of incorrigible conduct and commit her to said institution unless she was a minor. Nor did the board of trustees of said institution have any power to receive and retain her in custody, unless she was at the time of such commitment "between the ages of eight and eighteen years." It appears that she is a female and was born on March 17, 1889. By section 25 of the Civil Code minors are defined as: "1. Males under twenty-one years of age; 2. Females under eighteen years of age." And section 26 of the Civil Code provides that "the periods specified in the preceding section (i. e., section 25) must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority." It thus conclusively appears that the said Julia A. Wood completed the period of her minority at the commencement of the sixteenth day of March, 1907, and

that at the time of said adjudication and commitment she was of full adult age. (*Ganahl v. Soher* (Cal.), 5 Pac. 80.)

The respondent has presented no argument nor authority in justification of the action of the court, and we find no warrant in subdivision 1 of section 20, under which the proceedings were had, authorizing the commitment of adults to any such institution upon the charge that they are guilty of incorrigible conduct. The benefits of the Whittier state school according to the title of the act as amended in 1893, were intended for juvenile delinquents only.

This conclusion renders it unnecessary to pass upon the question as to the power of the court to commit her for a period extending three years beyond the time when she arrived at adult age, as well as other questions presented by the petition.

It is, therefore, ordered that the said Julia A. Wood, on behalf of whom said application is made, be discharged.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 382. Second Appellate District.—April 30, 1907.]

COMMERCIAL BANK OF SANTA ANA, Respondent, v.
T. A. WELLS and J. E. WELLS, Appellants.

APPEALS—AMBIGUOUS UNDERTAKING—DISMISSAL.—Where the notice of appeal was from the judgment and from an order denying a new trial, and the only undertaking filed was conditioned to "pay all costs and damages which may be awarded on the appeal or on a dismissal thereof, not exceeding three hundred dollars," it is not possible to determine which appeal is referred to in the undertaking; and it is so ambiguous that it must be regarded as if none had been filed and both appeals must be dismissed.

Id.—LAPSE OF TIME TO APPEAL FROM ORDER.—The motion of appeal having referred both to the judgment and order, each of which was appealable, the fact that the time had lapsed for taking an appeal from the order is of no consequence.

Id.—NEW UNDERTAKING NOT PERMISSIBLE.—To permit a new undertaking to be filed would be in effect to permit a new appeal to be perfected after the time fixed by law; and an application therefor must be denied.

MOTION to dismiss appeal from a judgment of the Superior Court of Orange County, and from an order denying a new trial. Z. B. West, Judge.

The facts are stated in the opinion of the court.

J. Marion Brooks, for Appellants.

E. E. Keech, for Respondent.

ALLEN, P. J.—Motion to dismiss appeals. The notice of appeal was from the judgment and from an order denying a new trial. The only undertaking filed was conditioned to "pay all costs and damages which may be awarded on the appeal or on a dismissal thereof, not exceeding three hundred dollars." It is not possible to determine which appeal is referred to in the undertaking. "It is so ambiguous that it must be regarded as if none had been filed." (*People v. Center*, 61 Cal. 191; *Home & Loan Associates v. Wilkins*, 71 Cal. 626, [12 Pac. 799].) The fact that the time had elapsed within which one of the appeals should be taken is of no consequence. The notice referred to the judgment and order, both of which were appealable. A different rule applies when the notice relates to a nonappealable order. (*Wadleigh v. Phelps*, 147 Cal. 140, [81 Pac. 418].)

The application to file a new undertaking must be denied. "To allow a new one to be filed would be, in effect, to permit a new appeal to be perfected after the time fixed by law." (*Home & Loan Associates v. Wilkins*, 71 Cal. 626, [12 Pac. 799].)

Application to file undertaking is denied and the appeals dismissed.

Shaw, J., and Taggart, J., concur.

[Civ. No. 305. Third Appellate District.—April 30, 1907.]

ANNIE E. TEICH, Appellant, v. S. ARMS, Respondent.

UNLAWFUL DETAINER—ESTOPPEL OF LESSEE—RIGHT TO SHOW TERMINATION OF LESSOR'S TITLE.—Though in an action of unlawful detainer the lessee is estopped from denying the title of the lessor, as it stood when the lease was executed, he is not estopped to show that the title of the lessor has expired or has been extinguished, or has been alienated from him by operation of law.

ID.—SALE TO STATE FOR TAXES—FAILURE OF REDEMPTION—TITLE FROM STATE—ATTORNMEN BY TENANT.—Where the land leased was sold to the state for taxes, and the right of the lessor to redeem after the execution of a deed to the state was foreclosed by the state's conveyance of the title to another owner, such owner has the right to receive the rents, and it is the duty of the tenant to attorn to the owner.

APPEAL from a judgment of the Superior Court of Madera County, and from an order denying a new trial. H. C. Gesford, Judge.

The facts are stated in the opinion of the court.

S. L. Strother, and M. K. Harris, for Appellant.

Defendant having gone into possession under the lease, he cannot dispute the lessor's title or attorn to a stranger to the lease. (Civ. Code, sec. 1948; *Thompson v. Pioche*, 44 Cal. 508; *Douglas v. Fulda*, 45 Cal. 592; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Gear on Landlord and Tenant*, p. 687; 12 Am. & Eng. Ency. of Law, 1st ed., pp. 697-701; *Freeman v. Ogden*, 40 N. Y. 105; *Smith v. Granbery*, 39 Ga. 381, 99 Am. Dec. 464; *O'Donnell v. McIntyre*, 118 N. Y. 156, 23 N. E. 455; *Austin v. Ahearne*, 61 N. Y. 6; *Sperling v. Isaacs*, 13 Daly (N. Y.), 275; *Lindley v. Dakin*, 13 Ind. 6; *Williams v. McMichael*, 64 Ga. 445; *Elliott v. Dycke*, 78 Ala. 150; *Thompson v. Felton*, 54 Cal. 547; *Betram v. Cook*, 32 Mich. 518; *Steinhouser v. Kuhn*, 50 Mich. 367, 15 N. W. 513.) In an action of unlawful detainer, the question of title is not involved, and cannot be raised. (Code Civ. Proc., sec. 1161, subd. 2; *Mason v. Wolff*, 40 Cal. 250;

Felton v. Millard, 81 Cal. 540, 21 Pac. 534, 22 Pac. 750; *Bostwick v. Mahoney*, 73 Cal. 238, 14 Pac. 832; *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111.)

F. A. Fee, and Frank H. Short, for Respondent.

It is conceded that a tenant cannot dispute the title of the landlord while it continues; yet he is not estopped to show that the title under which he entered has expired or has been extinguished. (*Jackson v. Rowland*, 6 Wend. 667, 22 Am. Dec. 557; 8 Am. & Eng. Ency. of Law, 2d ed., p. 442; *Hoag v. Hoag*, 35 N. Y. 471; *McDevitt v. Sullivan*, 8 Cal. 593; *Tewksbury v. Magraff*, 33 Cal. 237; 2 Greenleaf on Evidence, 253; *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442; *Franklin County Grammar School v. Bailey*, 62 Vt. 467, 20 Atl. 820, 10 L. R. A. 405; *Stout v. Merrill*, 35 Iowa, 47.) Where title has passed to the state, for delinquent taxes, the tenant, under a purchase of the title, may protect himself from conviction. (*Waggoner v. McLaughlin*, 33 Ark. 195.) The successor in interest of the title of the lessor is not a stranger to the lease, but is entitled to recover the rents, and becomes the true landlord to whom the tenant must attorn if he has notice of his title. (Civ. Code, secs. 84, 1111; *Taylor on Landlord and Tenant*, 439; *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861; *Harris v. Foster*, 97 Cal. 294, 33 Am. St. Rep. 187, 32 Pac. 246; *Dreyfas v. Hirt*, 82 Cal. 621, 23 Pac. 193; *McDonough v. Starbird*, 105 Cal. 19, 38 Pac. 510.)

BURNETT, J.—This is an ordinary action for unlawful detainer. The complaint alleges the execution of a written lease for one year from August 1, 1904, for the monthly rental of \$35, payable on the first of each month; that defendant entered into the occupation and possession of the premises; that on January 16, 1905, a demand in writing was made upon defendant to pay \$175, the amount of rent unpaid, or surrender possession within three days; that defendant refused to do either, and the prayer is for the rent due and for damages.

The answer sets up as a defense that on June 26, 1897, the property was sold to the state for delinquent taxes, and June 24, 1903, the deed was regularly made to the state; that thereafter, on August 6, 1904, the property was sold and conveyed

to the San Jose Safe Deposit Bank of Savings, and that thereupon said bank entered into possession and leased and hired the premises to defendant, and on or about the fifteenth day of August, defendant entered into possession as the tenant and lessee of said bank and has continued as such and has paid to the bank all the rent due.

The judgment was for defendant. The plaintiff brings the appeal from the judgment and order denying her motion for a new trial.

Appellant admits the regularity and validity of the tax proceedings, and does not question the sufficiency of the conveyance to the state and to the bank. The only controversy, she says, is as to the effect of the deeds upon the relation to each other of plaintiff and defendant.

The vital question is, Was the transaction set up in the answer sufficient in law to destroy the relation of landlord and tenant between the parties to this action and absolve defendant from any liability to pay rent to plaintiff? The question was presented to the trial court when defendant offered in evidence the deed from the state to the bank. The objection was made that "said deed is incompetent, irrelevant and immaterial in this case on the ground that a tenant in possession could not dispute his landlord's title or attorn to a stranger; that the said deed constituted no defense to this action."

At the outset it is contended by appellant that the question of title is foreign to the issue in unlawful detainer. As a general proposition this is undoubtedly true. It is *always* true when we limit it to the title of the plaintiff at the time of the execution of the lease. This follows from the nature of the action. The question at issue is not title, but the right to the possession; hence evidence of title could only be received as showing the right to the possession of the property, and this evidence could not be directed to the time of the execution of the lease, for the simple reason that on well-known principles of equity, the defendant, having entered into the possession of the property by virtue of his recognition of plaintiff's title, is estopped from thereafter denying it.

In *Mason v. Wolff*, 40 Cal. 250, the court, speaking through Mr. Justice Temple, said: "Here the question of title is not involved and cannot be raised. In a certain sense the suit

is brought upon the lease, and the consequence of entering into that contract can only be avoided by showing some fraud or mistake which would have been sufficient to set aside the lease itself." In that case, it will be observed, the errors reviewed consisted in the improper admission of evidence which did not affect the validity of plaintiff's title, but it is obvious the rule stated by the court, in its general application, is correct.

To the same effect are *Bostwick v. Mahoney*, 73 Cal. 239, [14 Pac. 832], *Felton v. Millard*, 81 Cal. 541, [21 Pac. 534, 22 Pac. 750], and *Knowles v. Murphy*, 107 Cal. 113, [40 Pac. 111], where, through Mr. Justice Harrison, it is declared as follows: "It was immaterial for the purposes of this action whether the deed from the defendants to Salor was *absolute* or by way of *mortgage*. The question of title was not involved and the defendants could not avoid the obligations assumed by them by reason of the lease by showing that Salor did not have the title of the premises which he demised to them."

In all the foregoing cases the title considered was the title at the time of the execution of the lease, and the doctrine announced is not only correct on principle but it accords with all the authorities. But defendant is not estopped from contending that since the execution of the lease the title of plaintiff has been extinguished; and such evidence may be material as tending to show that plaintiff, since the transaction with defendant, has lost the right to the possession of the premises and that the relation of landlord and tenant no longer exists between the parties. The authorities so hold.

In *Jackson v. Rowland*, 6 Wend. 670, [22 Am. Dec. 557], the supreme court of New York said: "A tenant cannot dispute the title of the landlord so long as it remains as it was at the time the tenancy commenced, but he may show that the title under which he entered has expired or has been extinguished."

Greenleaf declares the same rule: "The tenant may always show that his landlord's title has expired or that he has sold his interest in the premises or that it is alienated from him by judgment and operation of law." (2 Greenleaf on Evidence, 253.)

Our own courts have so decided. In *McDevitt v. Sullivan*, 8 Cal. 596, it is said: "Although as a general rule a tenant cannot dispute his landlord's title, he may show that it has terminated," citing *Chitty on Contracts*, page 296.

In *Wheelock v. Warschauer*, 21 Cal. 317, again it is declared: "The right to maintain the action depends upon the existence of a tenancy, and a tenancy once created is presumed to continue so long as the tenant remains in possession. This presumption may be rebutted, however, for the rule which estops a tenant from disputing the title of his landlord does not preclude him from showing that the tenancy has been determined."

And in *Tewksbury v. Magraff*, 33 Cal. 244, Mr. Justice Sanderson, speaking for the court, reaches the same conclusion: "Whether a tenant can dispute his landlord's title depends upon a variety of circumstances. . . . One exception to the general rule is, where the tenant has been ousted by title paramount he may plead it; also that the landlord's title has ceased or become extinguished."

In the case at bar the defendant did not question the title under which he entered. He did not dispute plaintiff's possession or right to the possession at the time of the execution of the lease. The effect of the deed to the bank was to extinguish plaintiff's title and right of possession, and since it did not become operative until after the creation of defendant's tenancy it was admissible under the authorities cited. By the recitals of the deed it appears that before the execution of the lease the property had been sold to the state; but the evidence was not offered nor received for the purpose of attacking plaintiff's title at the time she leased to defendant. On the contrary, this deed shows that the state simply held the property for security with the right of possession and redemption in plaintiff until the deed was executed to the bank some days after defendant went into possession. Section 3817, Political Code, as it now stands, provides that: "In all cases where real estate has been sold or may hereafter be sold for delinquent taxes to the state, *and the state has not disposed of the same*, the person whose estate has been or may hereafter be sold, his heirs, executors, administrators or other successors in interest shall at any time after the same has been sold to the state and *before the state shall have disposed of the same*

have the right to redeem such real estate," etc. At the time of the lease, therefore, the plaintiff was in possession of the land; she had a right to the possession and the right to redeem. That included the title as far as involved in the transaction between plaintiff and defendant. When, however, the state "disposed of the same" on August 6th the right to redeem was foreclosed, the right of plaintiff to remain in possession no longer existed, plaintiff's title was completely extinguished and the whole interest was conveyed to the bank.

In the American and English Encyclopedia of Law, volume 27, page 982, we find the general doctrine announced as follows: "The general rule is that until the expiration of the time for redemption and the execution and delivery of a deed the title to the land sold for the taxes remains with the original owner and the purchaser acquires only a lien for the amount of his bid with interest, etc. The purchaser is not entitled to possession or to rents and profits; but after the execution of the deed the grantee is vested under the statutes in most jurisdictions with an interest in fee to the exclusion of all prior interests and encumbrances."

The deed to the bank undoubtedly vested in it the entire estate in and to the property. The covenant to pay rent runs with the land. (Civ. Code, sec. 1463.) By virtue of the conveyance from the state the bank became entitled to the rent accruing after said conveyance and could have maintained an action therefor. The rule was different at common law. In Taylor's Landlord and Tenant it is stated as follows: "No person can take advantage of a covenant or condition except he be a party or privy thereto; consequently the assignee of the reversion could at common law neither sue nor be sued upon covenants contained in a demise, whether such demise were for life or for years. . . . The principle seems to have followed from that provision of the feudal law which prevented a lord from transferring his seigniorship without the consent of his vassal. . . . But as experience showed that property best answers the purposes of civil life when the transfer and circulation are free, this restraint upon alienation was gradually removed by the English statutes, particularly by 32 Henry VIII, C. 34. . . . By it the privity of contract, together with the privity of estate, was transferred to the assignee of the reversion; who then stood, with regard

to a tenant, in the same position as the lessor did before he parted with the reversion."

We now come to the consideration of the cognate proposition stated by appellant that the bank is a "stranger," and therefore the attempted attornment to it by defendant was void. Section 1948 of the Civil Code is cited, which provides that: "The attornment of a tenant to a stranger is void, unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction." Whatever the scope of the section, we think it does not apply to the facts of this case. The bank is in sufficient privity with plaintiff in regard to the title as not to be a "stranger" within the contemplation of the statute. We can see in principle no difference between the facts here and where the landlord has himself conveyed all of his interest to a third party. In such a contingency no question could be raised as to the right of attornment to the grantee. Section 821 of the Civil Code is applicable here as it would be in case the plaintiff had directly conveyed the land to the bank, and it provides that: "A person to whom any real property is transferred or devised, upon which rent has been reserved or to whom any such rent has been transferred is entitled to the same remedies for recovery of rent . . . as his grantor or devisor might have had." And for the protection of the tenant it is provided in section 1111, Civil Code, that: "Grants of rents or reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who before notice of the grant shall have paid rent to the grantor must suffer any damage thereby."

In *McDonald v. Hanlon*, 79 Cal. 442, [21 Pac. 861], it is held that "while real property is occupied by a tenant from month to month, where the owner makes a lease *in praesenti* to a third person for five years, such other person may without entering into possession and without attornment to him change the terms of the tenancy and upon nonpayment of the increased rent may maintain an action of unlawful detainer." (See, also, *Dreyfus v. Hirt*, 82 Cal. 621, [23 Pac. 193]; *McDonough v. Starbird*, 105 Cal. 19, [38 Pac. 510]; *Franklin v. Palmer*, 50 Ill. 200.)

We have examined all the cases in other jurisdictions cited by appellant. Some support her contention while others are

opposed to it. We think the law in this state was properly determined by the court below.

The judgment and order are affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 380. Second Appellate District.—May 1, 1907.]

THOMAS HIGGINS, Petitioner, v. C. G. KEYES et al., Respondents.

MECHANICS' LIENS—FORECLOSURE—MONEY DUE CONTRACTOR—DEPOSIT BY OWNER TO ABIDE JUDGMENT—APPEAL—STAY BOND—MANDAMUS.
In a consolidated mechanics' lien suit for foreclosure of liens against the owner of the property and the contractors, where the owner deposits in court the amount due to the contractors to abide the judgment therein, and to be applied in satisfaction thereof as the court may direct, the deposit must be construed to refer to the judgment finally rendered; and where an appeal is taken by the owner, upon a stay bond, he is not entitled, pending the appeal, to a writ of mandate to compel a return of the deposit, in the absence of an order of the court to that effect and a refusal to obey it by the custodian of the money.

PETITION for writ of mandate to compel the return of money deposited in the Superior Court of Los Angeles County to abide judgment therein.

Respondent C. B. Keyes is County Clerk of Los Angeles County. Further facts are stated in the opinion of the court.

Gray, Barker & Bowen, and R. L. Horton, for Petitioner.

J. D. Fredericks, District Attorney, Hartley Shaw, Deputy District Attorney, and Charles L. Batcheller, for Respondents.

TAGGART, J.—Petition for a writ of mandate. Petitioner is the defendant owner in a consolidated mechanics' lien foreclosure proceeding brought by the Los Angeles Pressed Brick Company et al., against petitioner and Alpeter,

Hall & Alpeter, contractors, in the superior court of Los Angeles county.

The findings in that case recite that at the commencement of the trial in said proceeding petitioner "deposited in court the sum of \$18,617.99 to abide the judgment of the court in these causes and to be applied in satisfaction of such judgment as the court may direct." Judgment was rendered in favor of said contractors against petitioner for the sum of \$15,993.24 with interest; for personal judgments in various sums in favor of several of the lien claimants against the contractors; for liens in favor of two of said claimants against the property of petitioner to secure the payment of their claims; and in favor of petitioner against both the lien and claim of one of the claimants. The judgment directs the clerk to pay from the \$18,617.99 deposited by petitioner the attorneys' fees of the two claimants whose liens were declared valid, and to distribute and apply the \$15,993.24 awarded to the contractors to the payment, first, of the two claims which were held to constitute liens against the premises, and next, *pro rata* of the claims of the other claimants who recovered judgments against the contractors.

Petitioner appealed from the judgment and two adverse orders of the trial court, and filed an undertaking on such appeals. The conditions of the undertaking and obligations of the sureties covered the costs on the three several appeals, a stay of execution from a money judgment in the sum awarded in favor of the contractors and against petitioner, and \$1,000—fixed by the judge of the court as the value of the use and occupation of the premises involved pending the appeal.

Demand was made upon the respondents and each of them, by petitioner, for a return of the money deposited by him, which demands were refused; whereupon he made application to the superior court for an order requiring the clerk to pay said fund to him, said petitioner. This application was denied without prejudice and this court is asked to issue its writ of mandate commanding the respondents to pay over said fund to petitioner.

The fund so asked to be returned was "deposited in court" and therefore paid to the clerk as an officer of the court and not as an individual. If it was paid to him as an individual, the proceeding here begun is not the proper one for its re-

covery. The money, however, as stated in the findings, was "deposited in court," and remains subject to the order of the court whether in the hands of the clerk or the treasurer. When the money was delivered to the clerk it was his duty, unless otherwise directed by law (Code Civ. Proc., sec. 2104) or by a conditional order of the court (sec. 573), to pay it over to the treasurer. Under the latter section it was probably competent for the court to have made a different order for its custody, but in the absence of such order the proper place for it was in the county treasurer's hands; and no such special or different order was made in the case.

It is not to be distinguished from any other deposit in court "to abide the judgment of the court." The "judgment," under such circumstances, has always been construed to mean the final judgment, and there is no final judgment in an action while an appeal is pending. The judgment rendered by the superior court is not to be considered in this connection, and the condition of the deposit has not been complied with. The deposit "to abide the judgment of the court" must have read into it "the Supreme Court."

If it be conceded that this is a special deposit under limited instructions, and the judgment of the superior court is "the judgment," the rendition of which the deposit was to abide and to the satisfaction of which the fund was to be applied "as the court may direct," then this contract may be enforced whatever the character or injustice of that judgment. We cannot read into the contract the clause, "if rendered to the satisfaction of the depositor," and if such a strict construction as petitioner contends for be given to the contract of deposit, we would be compelled to hold that the fund be applied as directed by the superior court regardless of petitioner's appeal.

Neither do we think it proper or competent for this court to consider and determine the questions which are directly involved in petitioner's appeal to the supreme court. There being other sufficient grounds upon which this court's action can be based, we do not think it necessary for us to express any opinion as to whether or not the judgment of the superior court is void as contended by petitioner.

The fund is in the custody of the court for a specified purpose, and while the county treasurer holds the *corpus* of the

fund, he does so merely as custodian for the court, and cannot be compelled to pay the money to anyone except on the order of the court holding the deposit. Until such an order has been made there is no duty imposed upon either the clerk or treasurer to pay out the money. Until he has refused to obey such an order properly made the treasurer has not refused to perform any act in connection with the fund so deposited with him that is specifically enjoined upon him as a duty resulting from his office, trust or station. (Code Civ. Proc., sec. 1085.)

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 864. Third Appellate District.—May 1, 1907.]

J. W. PRESTON, Respondent, v. MAURICE HIRSCH,
Appellant.

ACTION TO QUIET TITLE—EVIDENCE—UNITED STATES PATENT—RECORD OF CERTIFIED COPY—RECORDER'S COPY.—In an action to quiet title, where plaintiff deraigns title under a patent from the United States, a copy of which, certified by the commissioner of the general land office, was recorded in the proper county, the record of such copy has, under section 1160 of the Civil Code, *prima facie*, the same force and effect as the original for title or for evidences "until the original letters patent be recorded," and under section 1833 of the Code of Civil Procedure, the copy of such record certified by the recording officer is *prima facie* evidence.

ID.—TAX TITLE—OBJECTIONS TO EVIDENCE—RESERVATION OF RULINGS BY COURT—REASONS NOT STATED.—Where the defendant relied upon a tax title derived from the state, objections to the introduction of which were formally stated, and the defendant had full opportunity to answer them, and rulings thereupon were reserved with the consent of both parties, it cannot be held that the defendant was prejudiced by the final ruling excluding the title without stating the reasons for such ruling.

ID.—INVALID CERTIFICATE OF SALE—FAILURE TO RECITE YEARS OF ASSESSMENT—VOID DEED.—Under section 3776 of the Political Code requiring a certificate of sale by a tax collector to the state for delinquent assessment to recite the year of the assessment, a certificate which recites that the property was assessed in the year 18— is void and a deed issued thereunder to the state conveyed no title.

ID.—RECITAL OF YEAR IN CAPTION.—The recital of the year in the caption of the certificate is immaterial. The caption is no part of the certificate to which the tax collector certified, and cannot be referred to in aid of the certificate in a matter required by the statute to appear therein.

ID.—PROCEEDINGS ON TAX SALE IN INVITUM—STRICT PURSUIT OF STATUTES.—Proceedings on tax sale are in *invitum*, and to be valid must be *stricti juris*. The power exercised is purely statutory, and the steps directed by the statute must be strictly pursued.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge.

The facts are stated in the opinion of the court.

J. L. McNab, for Appellant.

J. W. Preston, for Respondent.

CHIPMAN, P. J.—Action to quiet title. Plaintiff had judgment, from which defendant appeals on bill of exceptions.

Plaintiff derails title from the government by patent to his immediate predecessor and a deed from the patentee to him. Appellant relies wholly upon his tax title. The levy was made for the year 1890-91. It was stipulated by counsel for plaintiff that the assessment, for which the attempted sale was made, was regular, and that all proceedings in relation to the delinquent tax list were duly and regularly done and made, and also all proceedings in regard to said levy, assessments and delinquency were regular up to the time of the issuance of the tax collector's certificate of sale of the same. Defendant thereupon offered in evidence the following records in the order named: 1. The tax collector's certificate of sale to the state; 2. His deed to the state; 3. The controller's notice to the tax collector directing the sale of the property at auction; 4. Affidavit of publication of controller's notice; 5. The deed by the tax collector to defendant. Plaintiff objected to the certificate of sale as irrelevant, incompetent and immaterial because not a certificate under the law. Particularly it was objected that no money was paid by anyone at the sale or at the date of the sale as required by section 3776 of the Political Code as it read in 1890 and 1891; also, that the certificate does not state the year of the assessment, but

leaves the date blank, as it reads: "Said property was assessed in the year 18—, . . . to T. Barnhart," etc., also, that the law then in force did not provide for the payment of any money and no money was paid, and hence no valid certificate could be made because the prerequisite facts as contained in the statute were not and could not be complied with. It was agreed "between the court and counsel that the final admissibility of said certificate should be argued in briefs to be submitted in court," and the evidence went in subject to the future ruling of the court. Defendant next offered in evidence the tax collector's deed. Plaintiff objected to its introduction on the grounds: 1. That it had not been shown either by the deed or other evidence that the thirty days' notice required to be given by the purchaser to the party on whose land the taxes have been assessed, as required by section 3785 of the Political Code as amended in 1891, has been given; 2. That no proof has been made that any notice of any kind has been served as required by said section 3785; 3. That the deed does not recite what the certificate of sale recites as to the time when the state would be entitled to a deed; i. e., "the date when the state would be entitled to a deed and the date of the certificate of sale are not one and the same as stated in the deed"; 4. The language of the certificate and in the deed is not the same and does not mean the same; in short, "the language of the deed is that the state would be entitled to a deed the very day the certificate is dated"; 5. "The deed does not recite the facts contained in the certificate which the Political Code, section 3786, required." The court reserved its ruling as before. The authorization for the sale issued by the controller was admitted to have been filed January 2, 1903, and in due form. The affidavit of publication of notice of sale was objected to on the ground that it does not contain a correct estimate of the minimum price at which the land must be sold, as required by section 3897 of the Political Code; that the auditor neglected to include in his estimate what are called penalties, and hence the amount at which the land was advertised to be sold was too small to comply with the provisions of said section. The ruling of the court was reserved as in the preceding offers. No point was made that the authorization of the controller, after being received, was not published. The

deed of the tax collector to defendant was then offered in evidence, to which plaintiff objected on the grounds: 1. That there is no certificate of sale to support the deed to the state; that there was no notice given as required by section 3785; that the deed could not recite the facts as contained in the certificate "because no such deed or certificate was validly in existence"; 2. That the deed purported to recite that the certificate of sale stated the land to have been assessed in the year 1890, whereas the certificate does not recite that fact; 3. That the deed states the purchase price less than the amount of the delinquent taxes, costs, penalties and accrued expenses, as required by section 3897.

1. At the close of the evidence the cause was submitted, and thereafter the court, in making its decision, sustained the reserved objections without giving any reason in support of its ruling. Defendant claims that this was prejudicial error. (Citing *Mayo v. Marzeaux*, 38 Cal. 445, and *Martin v. Lloyd*, 94 Cal. 204, [29 Pac. 491].) In these cases the supreme court strongly condemns the practice of suspending the rulings upon evidence, and especially advises that where the evidence is rejected at some subsequent period in the trial it is the duty of the court to give its reasons for the ruling. (*Raymond v. Glover*, 122 Cal. 471, [55 Pac. 398].) A case might be presented where the postponement of the decision would deprive the losing party of the opportunity to supply the evidence through unobjectionable means, and if this should clearly appear the ruling might be prejudicial error, if an early and timely ruling had been requested and denied. In the present instance, however, the objections were specific, and defendant was fully apprised of the grounds, and presumably counsel had the opportunity to place their views touching the objection before the court. Furthermore, the evidence was matter of official record, and could be supplied in no other way than that resorted to. Defendant could not, therefore, have been injured by the delay in ruling upon the evidence. It may be added that reserved rulings are generally reserved with the consent of both parties, which was the case here, and no court would decline to make rulings whenever it was shown to it that further delay might prejudice the rights of one or both of the parties. It is quite unusual for trial courts to state their reasons for rulings in admitting or

refusing evidence; and the instance would have to be peculiarly exceptional where, of the omission to give a reason for a ruling, prejudicial error could be predicated.

2. Plaintiff offered in evidence a certified copy of a copy of a United States patent to George Lynch, plaintiff's grantor. Defendant objected to its introduction upon various grounds, among them that there was no showing that the original could not be produced. It appears that a copy of the patent duly certified to be such copy by the commissioner of the general land office was recorded in the county of Mendocino on September 24, 1903. The document offered in evidence was a copy of this record duly certified by the county recorder. The copy of the patent thus recorded "shall have *prima facie* the same force and effect as the original, for title or for evidence, until said original letters patent be recorded." (Civ. Code, sec. 1160.) The copy of this record certified by the recording officer is *prima facie* evidence. (Code Civ. Proc., sec. 1833.) The document was properly admitted in evidence.

3. The objections made to the certificate of sale have already been stated. It is well settled that proceedings on tax sale are *in invitum*, and to be valid must be *stricti juris*. The power exercised is purely statutory, and the steps directed by the statute must be strictly pursued. (*People v. Central Pacific R. R. Co.*, 83 Cal. 393, 398, [26 Pac. 303].) It was held in *Simmons v. McCarthy*, 118 Cal. 622, [50 Pac. 761], that under section 3786 of the Political Code, requiring a tax deed to recite the matters recited in the certificate of sale, and section 3776, requiring the certificate of sale to state "the name of the person assessed, the description of the land sold, the amount paid therefor, and that it was sold for taxes, giving the amount and the year of the assessment, and specifying the time when the purchaser will be entitled to a deed," a tax deed reciting that the property was assessed "in the year 188—, for the year 1888 and 1889," is void for failure to state the year of the assessment. It was also held that such a deed cannot be aided by reference to the certificate of sale; also that the amount of the taxes and subsequent charges must be correctly stated. The same would be true of the certificate of sale in so far as the statute prescribed what must appear therein. The body of the certificate failed to state the year for which the property was assessed. Ap-

pellant claims that this omission is supplied by the caption of the certificate. It reads: "18—. No. 203. No. —, Book —, Page —, Sub —. Certificate of Sale of Real Estate. Sold for the Non-Payment of State and County Taxes for the year 1890." Then follows the formal certificate, reading:

"State of California, County of Mendocino—ss. I, J. M. Standley, Tax Collector," etc.

The caption is no part of the certificate to which the tax collector certified, and cannot be referred to in aid of the certificate in a matter required by statute to appear therein. Nor was the omission of the year a mere clerical misprision to be avoided as an irregularity by section 3885 of the Political Code, as claimed by appellant. It is also contended that the certificate transferred the title subject only to defeasance by redemption (*Teralta L. Co. v. Shaffer*, 116 Cal. 518, [58 Am. St. Rep. 194, 48 Pac. 613]), and redemption was never made; and that plaintiff cannot have his title made clear when the evidence shows that he has been divested of title. (Citing *Peterson v. Gibbs*, 147 Cal. 1, [109 Am. St. Rep. 107, 81 Pac. 121].) Finally, that plaintiff cannot have his title quieted while in default in the payment of his taxes; that he must come into court with clean hands or go out empty-handed. The answer to these various contentions is: First, that the certificate being fatally defective conveyed no title, and, secondly, the action is not against the state nor does it in any wise affect the rights of the state. The maxim of equity invoked by appellant is not open to him in this case.

4. Appellant has, with commendable consideration, called our attention to the case of *Johnson, Administrator, v. McNamara et al.* (not yet reported or published in California decisions), holding adversely to appellant's contention as to the validity of the tax deed. This concession renders further examination of the case unnecessary.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 825. Third Appellate District.—May 2, 1907.]

J. H. BEAUMONT, Appellant, v. W. H. SAMSON et al.,
BOARD OF SUPERVISORS OF TEHAMA COUNTY,
Respondents.

MUNICIPAL CORPORATION—VALIDITY OF ACTION OF SUPERVISORS—REMEDY
—CERTIORARI—QUO WARRANTO.—*Certiorari* will not lie to test the
validity of the action of the supervisors in declaring territory de-
scribed in its order to be duly incorporated as a municipal corpora-
tion of the sixth class, under a specified name. The proper remedy
is by a proceeding in *quo warranto*.

APPEAL from a judgment of the Superior Court of Te-
hama County, and from an order dismissing a proceeding
upon writ of review. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

Charles L. Donohoe, and Frank Freeman, for Appellant.

W. A. Fish, District Attorney, and McCoy & Gans, for
Respondents.

CHIPMAN, C. J.—*Certiorari*. This is an appeal from the
judgment and order of the superior court of Tehama county
denying plaintiff's application for a writ of review and dis-
missing the proceedings therein.

Proceedings were taken before the board of supervisors of
said county, which resulted in an order of said board declar-
ing the territory in said order described to be "duly incor-
porated as a municipal corporation of the sixth class, under
the name and style of the Town of Corning." The purpose
of the action is to set aside, vacate and annul all of said pro-
ceedings and to obtain a decree that said incorporation is
invalid.

Several questions arising in the case have been discussed,
and among others it is contended by respondents that plain-
tiff had a plain, speedy and adequate remedy by *quo warranto*
and that this latter, and not *certiorari*, is the appropriate
remedy, and it was so held by the learned trial judge. We

think the point well taken, and this makes it unnecessary to notice other questions.

It appeared that pursuant to the order of the board, the persons named as trustees of said town of Corning entered upon the discharge of their duties, and were so acting at the commencement of this action. Whether or not a *de jure* corporation, the officers elected to exercise its powers and functions assumed to act under the authority conferred by the proceedings taken by the board of supervisors, and we think the organization constituted a *de facto* corporation. The good faith of these officers in so acting is not called in question, nor is it disputed that they were acting under the authority supposed by them to be conferred by the proceedings leading up to the formation of an assumed valid and legal corporation. At most, the acts of these trustees constituted a usurpation of, or an intrusion into, a public office, and their authority so to do, it seems to us, cannot be properly determined otherwise than by the method pointed out in section 803 et seq. of the Code of Civil Procedure, commonly called proceedings by *quo warranto*.

The writ of review, or *certiorari*, lies when "an inferior tribunal, board, or officer, exercising judicial functions, has exceeded" its jurisdiction, "and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." (Code Civ. Proc., sec. 1068.) The office of this writ is not so much to determine the valid existence of the tribunal, board, or officer, while acting in a judicial capacity, as it is to determine whether the jurisdiction of such tribunal, board or officer has been exceeded. "The character of the act or determination sought to be reviewed, rather than the tribunal or officer by which the act or determination is made, is the test for determining whether the writ should be issued, for it is only a determination which is made 'when exercising judicial functions' that can be reviewed." (*Quinchard v. Board of Trustees*, 113 Cal. 664, 668, [45 Pac. 856].)

In volume 17, Encyclopedia of Pleading and Practice, page 412, it is said: "*Certiorari* to ministerial boards or officers is not the proper remedy to try the title to an office or the right to exercise corporate functions. *Quo warranto* is the only remedy which affords complete relief, and although questions regarding the legality of an election may be collaterally

raised and determined by *certiorari* in determining the validity of laws or ordinances of municipal bodies, yet for the purpose of directly testing the right to a public office *quo warranto* and not *certiorari* is the proper remedy. Nor is *certiorari* allowed for the purpose of bringing up a certificate of incorporation or other proceedings for the purpose of enabling the court to determine the legal existence of an alleged corporation. For the purpose of determining such questions, the proper remedy is by *scire facias* or *quo warranto*, so that the corporation may be in court." (See cases cited in footnotes.)

In the case of *State v. Osburn*, 24 Nev. 187, [51 Pac. 837], the action was for a writ to review the proceedings of the city council of the city of Reno, Nevada. The statute relating to this writ is substantially the same in that state as in California. The question of the constitutionality of the act incorporating the city of Reno was raised, and the court, in passing upon that question, said: "We are not determining whether the city council of that city exceeded its jurisdiction in ordering bonds to be sold for the purposes indicated, . . . but we are passing upon the rights of the respondent to exercise the functions of city council, and upon the validity of the corporate existence of the City of Reno. This we do not believe we have the power or authority to do, under the limitations of the regulative statute above cited." The court then proceeds to show that the question of corporate existence "must and can be determined by another proceeding, plain, speedy and adequate." Reference is then made to the statute regulating proceedings in *quo warranto* as furnishing the true remedy.

The cases are numerous in our reports where the form of action was *quo warranto* to determine the right to enjoy a franchise or exercise the powers of a municipal or other corporation. *People v. Town of Linden*, 107 Cal. 94, [40 Pac. 115], cited by appellant, is an instance. Our attention has been called to but one case where the action by writ of review seems to have been resorted to for the purpose of determining the validity of the proceedings of a board of supervisors resulting in the incorporation of a town. The question now before us was not raised in that case. Furthermore, the opinion is careful to state the limitation of the inquiry solely

to the correction of errors or irregularities within the jurisdiction of the board while exercising judicial functions. Many acts connected with the statutory proceeding for the creation of a municipal corporation are shown to be legislative or ministerial and not within the corrective force of a writ of review. It would seem to us that a remedy incapable of determining the validity or invalidity of all the steps taken by the board of supervisors would be inadequate to an inquiry as to the validity of the corporation created by the board. And then, too, every consideration requires that the corporation thus created should be a party to the action and have its day in court.

The judgment discharging the writ and dismissing the proceedings is affirmed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 818. Third Appellate District.—May 6, 1907.]

J. W. REED and C. E. PAINE, Respondents, v. J. W. COLLINS et al., BOARD OF SUPERVISORS OF MARIPOSA COUNTY, Appellants.

LICENSE—SALE OF LIQUORS—COUNTY ORDINANCE—ARBITRARY REFUSAL BY SUPERVISORS—MANDAMUS—FINDINGS—REVIEW UPON APPEAL.—

Under a county ordinance regulating liquor licenses, where applicants for a license had been refused, and upon their petition for a writ of mandate to compel its issuance, the court found that they had followed the prescribed method to obtain the license under the ordinance, that they were fit and proper persons, that no exception was taken by the supervisors to their character or standing, and that the supervisors arbitrarily rejected their petition without cause, and the court granted the mandate, if no evidence is returned upon appeal from the judgment, it must be assumed that the evidence supported the findings and the judgment must be affirmed.

ID.—PROVISION IN ORDINANCE FOR "DUE CONSIDERATION"—ARBITRARY DISTINCTION.—The provision in the ordinance for "due consideration" of an application for a license simply means a consideration of the application upon its merits, and the return of a judgment based upon some substantial reason arising upon evidence heard, and does not justify an arbitrary distinction against the applicants.

Id.—GROUNDS OF REFUSAL MATERIAL—EXERCISE OF POLICE POWER.—The grounds upon which the governing body of a city or county bases its action in the refusal of a license to sell liquor by retail are extremely material and important. They are not confined to the terms of the ordinance, since, under a proper exercise of the police power granted by the constitution, a license may be refused upon sufficient grounds stated, shown by the evidence before it, addressed to the unfitness of the applicant, or the unsuitableness of the place at which the saloon is to be located.

Id.—CONCLUSIVENESS OF REJECTION FOR GOOD REASON.—When the evidence is taken upon a sufficient ground, and the result is the rejection of the application, the action of the governing board in ordering such rejection is conclusive, and not a question for judicial determination, unless it is made to appear that the evidence in no manner or degree developed any good reason for the rejection.

APPEAL from a judgment of the Superior Court of Mariposa County. J. J. Trabucco, Judge.

The facts are stated in the opinion of the court.

J. A. Adair, for Appellants.

John A. Wall, for Respondents.

HART, J.—Plaintiffs obtained judgment in the court below, granting a peremptory writ of mandate to compel the defendants, as members of and constituting the board of supervisors of Mariposa county, to issue to said plaintiffs a license to traffic within the limits of said county in the retail liquor business.

The defendants appeal from the judgment, upon the judgment-roll alone.

The plaintiffs made application for said license in accordance with the provisions of an ordinance, adopted by said board of supervisors on the fourth day of January, 1900, and designated and known as "Ordinance No. 73." This ordinance is set out in full in the complaint. The part of the ordinance which is important to the consideration of the question submitted here for adjudication provides that it shall be unlawful for any person or persons to "open, establish or conduct, or caused to be opened, established or conducted, any barroom or public saloon . . . where wines, spirit-

uous or malt liquors are sold by the glass, bottle or otherwise, in less quantities than one quart, within the limits of the county of Mariposa, without first obtaining permission from the Board of Supervisors, and filing a bond as hereinafter provided." Provision is then made that the application for such permission shall be made by petition in writing to the board of supervisors, and that "if, after due consideration of the same by the Board of Supervisors, the petition be favorably acted upon, it shall be the duty of the person in whose favor the petition was presented and the prayer of which was granted, before opening the said place, to file with the Board of Supervisors a good and sufficient bond, to be approved by the Chairman of the Board, with two sureties, in the sum of one thousand dollars, conditioned that the applicant shall maintain said place in a quiet, orderly and decent manner." After declaring that, on the third day of October, 1906, the said board of supervisors, at a regular meeting thereof, rejected said application and refused to grant the plaintiffs the license so applied for, the complaint proceeds to allege: "That in making such rejection and in refusing to grant the said license, the said board of Supervisors took no exception whatever to the said petition, either as regards its form, substance or sufficiency in any respect, and said board of supervisors took no exception to the personal character or standing in the community of your petitioners or either of them, but on the contrary the members of said board found no fault with petitioners or either of them regarding their respective characters or standing in the community." It is also charged that "the said action of the said board of supervisors in refusing to grant petitioners a license as asked for by them was purely arbitrary on the part of said Board and entirely without cause, and the action of said board in so rejecting said application of your petitioners was not in the exercise of any right conferred on said Board by any ordinance of the county of Mariposa, and was in violation of the provisions of the ordinance hereinbefore set forth and without right or authority."

A general demurrer was interposed to the complaint by the district attorney, acting for and in behalf of the defendants, and overruled by the court. Thereafter an answer was filed denying the necessary and material allegations of the com-

plaint and affirming the right of defendants to refuse the license, averring that in so doing they acted in accordance with their official duty and within their authority under the law. The court found the material facts as alleged in the complaint to be true, and among others, "that in making such rejection and in refusing to grant the said license, the said Board of Supervisors took no exception whatever to the petition of petitioners, either as regards its form, substance or sufficiency in any respect and took no exception to the personal character or standing in the community of the petitioners or either of them, but on the contrary, the said Board of Supervisors found no fault with petitioners or either of them regarding their respective characters or standing in the community. That at all the times mentioned in the petition the petitioners herein are and at the time of making the application for a license to the Board of Supervisors were fit and proper persons to be granted a license for the purpose for which they demanded the same and that such fitness of said petitioners was at all times well known to the said Board of Supervisors." The court also found "that the action of said Board of Supervisors in refusing to grant petitioners herein a license as asked for by them, was purely arbitrary and entirely without cause," etc. The appeal being from the judgment upon the judgment-roll alone, there is, of course, no attempt made to present the evidence taken at the trial, and it is further a matter of course, that the evidence heard by the court must be assumed to fully support the findings.

The court below filed a written opinion, and the conclusion reached appears to be largely, if not altogether, based upon the ruling in the case of *Henry v. Barton*, 107 Cal. 535, [40 Pac. 798]. That case seems to be on all-fours in respect of the facts with the one before us, and it is there held that the judgment of mandate awarded to the plaintiff was proper, and it was therefore affirmed. The legislative or governing body of the city of San Bernardino had adopted an ordinance regulating the retail liquor traffic whose provisions, so far as they concern the procedure to be followed in obtaining a license, are in effect the same as those in the ordinance before us. The plaintiff, having in pursuance of the provisions of said ordinance petitioned for a license to sell liquor at retail, and the board of trustees of said city having refused to grant

the same, petitioned the superior court for, and secured a peremptory writ of mandate compelling said board to issue to him such license. The court, in the case mentioned, says: "This action of the Trustees cannot be successfully maintained. The ordinances of the City of San Bernardino as they now stand, entitle any man who complies with their provisions to a retail liquor license, and this respondent complied with these provisions. Trustees of cities have no power except that given them by express provision of law, and we find no power in any of these ordinances vesting in them discretion as to the granting or denying an application for a liquor license. In the absence of some express legislative enactment granting such right there is no principle of law that will allow the trustees of any city to say that a liquor license shall be granted to A., and the same right denied to B." According to this opinion, then, it will be noticed there must be expressly vested in the governing body "a discretion as to the granting or denying of an application for a liquor license," otherwise, as we understand it, the license must, under any circumstances, issue. And this broad statement of the rule as declared in that opinion seems to be further justified by language previously expressed therein that "no evidence was taken in the case, and consequently we know nothing of the specific facts or grounds upon which this action of the trustees was based; but, as we look at the case, the grounds, whatever they may have been, are wholly immaterial." (Italics are ours.) That case was decided in department. We deem it no impropriety, preliminarily to stating our conclusion here, to say that, so far at least as the writer of this opinion is concerned, we do not feel that we can concur in all that appears to be said in *Henry v. Barton*, 107 Cal. 535, [40 Pac. 798]. It has been repeatedly declared by the courts that the retail traffic in intoxicating liquors is a business in which a citizen or other person has no inherent right to engage; that the sale of such liquors in that form may be by the state, in the exercise of its power of police, entirely prohibited or suppressed, or the state may regulate its sale by the imposition of such conditions and restrictions as it may see fit to adopt, provided, of course, such conditions and restrictions in no way interfere with interstate commerce. (*Cromley v. Christensen*, 137 U. S. 91, [11 Sup. Ct.

Rep. 13]; *Ex parte Christensen*, 85 Cal. 213, [24 Pac. 747]; *Ex parte Campbell*, 74 Cal. 20 et seq., [5 Am. St. Rep. 418, 15 Pac. 318]; *Ex parte McClain*, 61 Cal. 437, [44 Am. Rep. 554].)

The grounds upon which a governing board of a city or county bases its action in the refusal of a license to sell liquor by retail are, it seems to us, extremely material and important. If the language of the opinion in the *Henry v. Barton* case is to be accepted as meaning that when a license is once applied for in compliance with the provisions of an ordinance regulating the retail sale of liquor and which does not in terms reserve to the governing board discretion to arbitrarily refuse a license, that there is no other alternative remaining to the board but to grant it, notwithstanding that evidence may be taken to satisfactorily show the petitioner to be a wholly unfit person to conduct a public barroom or saloon, then, it seems to us, that the necessary corollary of that proposition is that, while the board has the power to suppress the sale of liquor by retail altogether, if once it adopts such an ordinance licensing it, it thereby surrenders the power vested by direct grant from the constitution in the municipality of which it is the legally constituted representative to afford full protection to the public by limiting "to the utmost the evils" which are often the offspring of such occupation. If we do not misapprehend the decision, its effect is as thus stated, and we feel no diffidence in declaring that we are not prepared to accept the proposition as sound law, or as an accurate construction of the police power. We are of the opinion rather that, whatever may be the provisions of an ordinance respecting the licensing of the retail liquor business—whether in express terms it clothes the governing board with a discretion to grant or to refuse a license in a given case or not—there is, nevertheless, reserved to said board sufficient of the power directly granted to it, or to the municipality for which it speaks, by the constitution (Const., art. II, sec. 11), over the subject to definitively and conclusively determine, upon due investigation, whether a license granted to a particular individual would be a public menace, and if so, to refuse to so grant it, without occasion or ground to fear that such action could not resist the coercive power of the judicial arm of the government. There can be no

doubt that the trend of judicial opinion is pointed in the direction of committing to the local authorities, as the people through their organic law seem to have endeavored to do, a very extensive discretion in the matter of dealing with and regulating this, as well as other occupations which may, and often do, without reasonable regulation, tend greatly to the debasement and demoralization of the morals, health, peace and happiness of communities. Not only does this appear to be the judicial but as well the legislative policy of the state, for the legislature has limited the matter of the licensing of all classes of business by the boards of supervisors of counties and the legislative bodies of incorporated cities and towns to the purposes of regulation only. (Stats. and Amdts. of the Codes, 1901, p. 635, adding sec. 3366 to the Pol. Code.) There can be no question that if, after receiving a license to conduct a retail liquor business, the licensee should, contrary to the conditions of the bond required, suffer his establishment to become a disreputable or disorderly house, the board could recall or forfeit his license. Why, then, if before the granting of the license, evidence could be produced to show the applicant to be an unfit person to conduct such a place, or to be of a character or reputation to make the inference reasonably probable, that, if given a license, he would maintain his establishment in a manner modeled along the lines of his character or reputation, should not the board, regardless of whether the provisions of the ordinance gave it such discretion, have the power to reject his application and refuse him a license, and thus prevent damage rather than postpone action until perhaps some irreparable injury resulting from the issuance of the license had been suffered by the community? If evidence taken by the board should satisfactorily show that the applicant had once been incarcerated in a state prison for the commission of one of the meanest felonies known to the law, or that the place where it was proposed to locate the saloon was not the proper one for such a business—as, for example, that it was too near a public or private school or a church or in the residential part of the community, where it would be especially offensive—is it possible that the board would be powerless to prevent so grave a catastrophe as would follow the granting of a license under such circumstances, simply because the ordinance has not

expressly declared that there is vested in it discretion to say who shall or shall not have a license or where a saloon may or may not be located? The argument is often made that where so much power upon this subject is conceded to a municipal board the result may be, if such board should see fit to arbitrarily exercise it, the creation of a monopoly of the retail liquor trade in a community. The same argument may with equal force be addressed to the exercise of the same power of the board when it is expressed and specifically given in terms in an ordinance of regulation, as may regularly be done under the ruling in *Henry v. Barton, supra*. But the obvious reply to such arguments, it seems to us, lies in the fact, first, that public officers are presumed to perform their official duty faithfully, fairly and honestly, and secondly, that if, by the judgment of those agents of the state to whose sound discretion such matters are committed, it is concluded that the interests of the community they represent demand that the retail sale of liquor shall be so curtailed or restricted as that it may thereby result in placing it in the hands of a limited number of citizens, such consequence is only one of the many which may be expected to flow from necessary conditions which it is competent to impose upon the prosecution of an occupation in which the citizen has a right to engage, not because such right inheres in him, but only because he is permitted to exercise it by the mere sufferance or tolerance of the sovereign authority. These observations, though not necessary to a decision of the case before us, result, as we have indicated, from our interpretation of the language of the opinion in *Henry v. Barton*—that it is immaterial what the grounds of the rejection of an application for a retail liquor license may be, the board has no authority or right to reject, unless so empowered by some express legislative enactment, and that there is no principle of law, in the absence of such an enactment, “that will allow the trustees of any city to say that a liquor license shall be granted to A. and the same right denied to B.” The effect of our views upon this subject, as we have endeavored to express them, is that the board has the right under any circumstances, whatever may be the provisions of the ordinance, to take evidence upon the question of the character or reputation of any applicant to determine whether he is a fit per-

son to whom to grant such a privilege, or to determine as to the suitability of the place at which it is proposed to maintain the saloon or barroom; that when evidence is so taken, and the result is the rejection of the application, the action of the board in ordering such rejection is conclusive, and not a question for judicial interference and determination, unless it can be shown that the evidence in no manner or degree developed any good reason for the rejection based upon the character or reputation of the applicant, or in no manner or degree militated against the location of the saloon at the place proposed. These views are, we think, in a general way in harmony with those often expressed by the supreme court prior to the decision of the case of *Henry v. Barton*, 107 Cal. 535, [40 Pac. 798]. Of course we do not deny that where the board acted arbitrarily or refused to grant a license without reason, where such discretion was not expressly given it by the ordinance, such action may be reviewed and a mandate to require it to issue the license might lie. In other words, the board may not, under such an ordinance, have the power to refuse the license upon no reason, or what would be equivalent thereto, upon pretended grounds which do not comport with common sense—as, for instance, that the applicant, though a citizen, was not a native-born American, and like nonsensical grounds.

We have thus expressed our views upon the subject under consideration, because we felt that, as we must found our conclusion here largely upon the opinion in the case to which we have referred, and uphold the judgment of the court below, it was only justice to ourselves to explain how far our judgment would permit us to commit ourselves to the principles as they appear to be declared in that opinion. We know it to be our duty to follow "the law of the case" as it has been declared by the highest court of the state. This, of course, we propose to do here. But we know of no reason why we should not state our own opinions, whatever they may be worth, upon important questions coming before us, even though they may to some extent conflict with those expressed by the court superior to this, where, as here, in reaching a final conclusion we adhere to the rule, vital to the decision, as laid down by that court. As stated, there is no subject with which the courts are called upon to deal of greater

concern to society than the police power, and, while upon the main point which must govern in the decision of this case we feel compelled to agree with the department opinion to which we have referred, we have not hesitated to present our own views, deferentially, of course, upon the important general questions to which we have given some attention. Indeed, the questions here discussed are of the greatest importance, for, within all the vast body of the law, with its endless ramifications and the infinite variety of its operations, there are not to be found doctrines which, when properly and intelligently applied, are more efficacious in the attainment of the best and highest ends and aims of organized society than those which are included in and belong to the great power of police inherent in every state of the Union. Over all the subjects coming legitimately within its range and scope, the state is sovereign and supreme. In its comprehensive sense, "it embraces," says Judge Cooley, "the whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Or, as it is so forcefully and clearly put by Judge Blackstone, this power of which we speak is "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their behaviour to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." These are, of course, elementary principles with which all students of the law are fully familiar, but their restatement, when appropriate occasion arises, can do no harm, for frequent repetitions of them might, to the infinite advantage of society in general, have the effect of impressing them upon the minds of those gentlemen to whom is committed the serious duty of making and amending our laws, or of those citizens in incorporated cities and towns clothed by their fellowmen with the authority of exercising cognate duties within a more limited territorial sphere.

In the case at bar, however, from the findings of fact filed by the trial judge, we are led to conclude that the board either heard no evidence whatever, other than that furnished by the general meager statements of the petition by plaintiffs for the license, or if evidence was taken, it found nothing against them, either as to character or reputation, or nothing militating against the issuance of the license because of the proposed location. The board, therefore, seems to have acted arbitrarily or without particular reason on the application.

The case, in view of the facts thus presented by the record, appears, as suggested, to be within the ruling in *Henry v. Barton*, 107 Cal. 535, [40 Pac. 798], and should, therefore, be affirmed.

The district attorney, in his brief, directs special attention to the language of the ordinance, "If, after due consideration of the same by the Board of Supervisors, the petition be favorably acted upon," etc., and says from that language it is "apparent that defendants reserved to themselves the right to grant or refuse a license for the carrying on of a saloon business."

We see nothing in the quoted language from which it may even be implied that the ordinance intended reserving to the supervisors arbitrary discretion to reject an application for a license. On the contrary, the phrase "due consideration" means a consideration of the application upon its merits, and the return of a judgment based upon some substantial reason arising upon the evidence heard. As stated, under the ruling in the case of *Henry v. Barton*, and by the provisions of the ordinance pursuant to which the application was made, there is no warrant for making an arbitrary distinction as against the plaintiffs here.

For the reasons given, the judgment appealed from will be affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 314. Third Appellate District.—May 6, 1907.]

C. M. TATE, Respondent, v. A. B. AITKEN and E. P. CASE,
Appellants.

VENDOR AND PURCHASER—CONTRACT TO SELL—AGENCY—COMPENSATION OF AGENT.—A contract by plaintiff with defendants, by which they were authorized to sell the plaintiff's real estate for \$1,000, or such less sum as plaintiff may take, and giving to defendants, as remuneration, all sums in excess of the amount stipulated for sale, does not give to the defendants an option to purchase, but is a contract of agency, under which the defendants were bound to act in the utmost good faith.

ID.—BAD FAITH OF AGENT—MISREPRESENTATION TO PROCURE LARGER COMMISSION—DEED TO AGENT.—Where the plaintiff's agents had a contract to sell plaintiff's property for \$1,300, and, to procure a larger commission, misrepresented to plaintiff that \$800 was all they could get for the property, and thereby induced plaintiff to deed the property to them, for sale at that price, they acted in bad faith, and plaintiff is entitled to recover the remainder of the \$1,000 from them.

ID.—SIGNATURE BY PLAINTIFF'S WIFE—AUTHORITY—RATIFICATION—AGENCY OF DEFENDANTS FOR PLAINTIFF.—Where the plaintiff authorized his wife to sign the contract with defendants during his absence, making them their agents to sell the land upon the terms agreed upon, with the understanding with them that he would afterward sign it, and the employment of the defendants was ratified by the husband's execution of the deed to them by reason of the defendants' misrepresentation, the defendants were properly found to be the agents of the plaintiff.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order denying a new trial. Wm. M. Finch, Judge presiding.

The facts are stated in the opinion of the court.

M. J. Cheatham, and W. P. Johnson, for Appellants.

John J. Wells, for Respondent.

HART, J.—Plaintiff commenced this action for the purpose of recovering the sum of \$500 alleged to be due him from de-

defendants, said amount representing, it is alleged, the difference between the sum paid to plaintiff by the defendants for a piece of land belonging to the former, and the sum received for said land by said defendants on a sale of the same to a third party, the transaction involving such sale having been conducted, it is averred, by defendants as agents of plaintiff. Plaintiff was given judgment for \$200, from which and the order denying a new trial this appeal is taken.

The defendants, at and for some time prior to the date of the institution of this action, were copartners, engaged in the business of buying and selling real estate, at the town of Corning, in Tehama county. The plaintiff at the same time was the owner of "Lot numbered 2, in the Block numbered 11, in Richfield Colony, in the said County of Tehama." In the month of July, 1904, the plaintiff employed said defendants as agents, conferring upon them full authority to sell said lot, agreeing to pay them for their services in effecting the sale thereof so much as they might receive therefor in excess of a certain amount fixed and stated in a certain written agreement to be hereafter noticed.

It is charged in the complaint "that on the first day of July, 1905, the defendants bargained and agreed with one W. L. Yound, to sell and convey to him the said property for and in consideration of the sum of thirteen hundred dollars, which sum the said Yound then and there paid to the defendants." It is further alleged "that thereafter the defendants, while still the agents of plaintiff, for the purpose of making the sale of the said property, represented to plaintiff that they could sell the said property for the sum of eight hundred dollars, but not for any greater sum, and they prevailed upon the plaintiff to accept the said sum of eight hundred dollars, in full as payment for the said property." The plaintiff, it is alleged, thereupon executed a deed, conveying said property to defendants, and that the latter paid to him the sum of \$800; that immediately after said transaction, "and as a part thereof," the defendants conveyed said property to said W. L. Yound, the latter paying to the defendants therefor the sum of \$1,300.

The answer, after denying that the land was sold to defendants under the circumstances alleged in the complaint, and denying that plaintiff employed them as agents to sell said land, admits that the defendants purchased it at the price

mentioned, but declares that plaintiff sold the same to them upon his "own volition and without any inducements on the part of defendants other than the ordinary inducements usually made in transactions of this character." The sale of the land to Yound for the sum of \$1,300 is also admitted. The answer, as a "further and second defense," sets out the alleged written agreement to which we have previously referred, the same being signed by Mrs. K. M. Tate, the wife of plaintiff, and by the defendants, dated July 14, 1904, and by the provisions of which the defendants were purported to be given power and authority to sell the land described in the complaint "for the sum of \$1,000.00, or as much less as he (plaintiff) may take at any time therefor," and it was also stipulated in said agreement that the defendants, for the services of negotiating and consummating such sale, should retain, as their commission, "all over the above-mentioned sum." It is then alleged that in the month of May, 1905, and after the execution of the said written contract, "plaintiff, pursuant to the terms thereof, informed defendants that he would reduce the price of the property named therein from \$1,000.00 to \$800.00." The defendants further admit that when they purchased said land from plaintiff they were negotiating with said Yound for the sale of the same to him, etc.

The evidence offered by plaintiff in support of the allegations of his complaint shows, briefly stated, the following facts: That Mrs. Tate, wife of plaintiff, signed the written contract, set out in the answer, by the request and consent of the plaintiff, authorizing defendants to sell the property mentioned in the pleadings, upon the terms as therein stipulated; that plaintiff himself was also to have signed said contract, but failed to do so; that plaintiff approved the act of his wife in making and signing said contract; that on July 1, 1895, while plaintiff was absent from home, the defendant Case called at his residence, and stated to plaintiff's wife that he (Case) had a purchaser for the property if the price were reduced from \$1,000 to \$800; that Mrs. Tate asked time in which to consult her husband with regard to the proposition, but that Case advised her to take \$800 for the property, as that was as much as could be obtained for it, and that in selling it for that sum they (the defendants) would receive no commission; that finally Mrs. Tate consented to take the responsibility of authorizing the sale of the property for the amount

mentioned; that when plaintiff returned home his wife related to him the facts of the transaction which had occurred between her and the defendant Case; that he approved and ratified her action in the acceptance of Case's proposition to pay \$800 for the land, by the execution of a deed conveying the property to defendants, and left the same "at the bank" to be delivered to defendants upon the payment of the sum agreed upon; that defendants paid plaintiff the amount and received the deed, which bore date of July 5, 1905.

The foregoing represents in substance and effect the testimony given by Mrs. Tate. There was introduced in evidence a document, signed by the defendants, and dated July 1, 1905, purporting to be an acknowledgment by them of the receipt from W. L. Yound of the sum of \$1,300 "payment in full Lot 2, Blk 11, 34 acres more or less, Richfield." The plaintiff testified that his wife had told him of the conversation with Case, and that believing therefrom that the sum of \$800 was all that he could get for the property, conveyed the same to defendants for that sum. He stated, in reply to a question asked on cross-examination, that his wife acted for him in the matter, and that he had ratified her acts. Mr. Yound testified to having paid to defendants the sum of \$1,300 for the property on the first day of July, 1905. These are in brief the facts as shown by the evidence introduced on behalf of the plaintiff.

The defendants, while admitting having entered into the contract for the sale of the land to which they and Mrs. Tate had subscribed their names, testified that subsequent to the execution thereof, the price of \$1,000 called for by said contract for said property was verbally changed by plaintiff to \$800. The defendant Case testified as follows: "On Friday, the 30th day of June, I told her (Mrs. Tate) we had some parties looking at the place, and that we had hopes to sell. I explained to her and told her the price we were asking for the place was thirteen hundred dollars; that we often had to make trades, and I expected if we sold the place, to have to make a deal and trade it off. I went specifically to ask her if she would take less than eight hundred dollars. It was understood that eight hundred dollars was the price. It had been talked again and again. I asked her, in case we couldn't make a sale to do any better, if we should turn

it down, if we couldn't get the eight hundred dollars for her, and she said she would rather not take less than eight hundred dollars. I told her then that if she was satisfied to take the eight hundred dollars to come down the next morning to make out the deed, and we would take our chances on selling the place. Before I had gone out to Mrs. Tate's I had taken Mr. Yound out to look at the place and on Saturday I took him out again. In the afternoon of Saturday, Mr. Yound came back to the office and after some little talk he decided to take the property at \$1,300. . . . He then paid us the \$1,300.00. After he had paid us the money for the place, I went out and told Mrs. Tate that she could come in and have the deed fixed up and then we would pay her the money.

"She understood that Mr. Aitken and I had bought the place from her on Friday evening. We told her we would take the place and take chances on selling it. We were taking it under and in pursuance of that contract." Defendant Aitken corroborated the testimony of Case as to an alleged conversation with Mrs. Tate in the former's office in which the latter, it was claimed, said that she would be satisfied to receive \$800 for the property, and that she did not care how much defendants made over and above that sum. There was testimony to the same effect by one R. B. Aitken. In rebuttal, the plaintiff and his wife testified that, having heard, after the conveyance of the property to the defendants, the latter had sold the same for \$1,300, they called on the defendant Case, repeated to him what they had learned, and he then insisted that they had received but \$800 for the property from Mr. Yound, etc.

The court found that the defendants were the agents of plaintiff for the sale of the property; that as such agents of plaintiff they "bargained and agreed with one W. L. Yound to sell and convey to him the said property for and in consideration of the sum of thirteen hundred dollars, which said sum the said Yound then and there paid to defendants"; that defendants, after such sale to said Yound, represented to plaintiff that the sum of \$800 could be obtained for said property, and that it could be sold for no greater sum; that plaintiff, relying on such representations, and, being in ignorance of the negotiations for the sale of the land by defendants to Yound, accepted the sum of \$800 therefor, and

thereupon conveyed the same to defendants; that thereafter defendants conveyed the land to Yound.

The appellants undertake to avoid the effect of the judgment against them upon the ground that, as they seem with earnestness to contend, as to the transaction responsible for this action, they were not at any time acting as, or were, in fact, the agents of plaintiff. This contention is urged mainly upon the proposition that the written contract which purported to authorize them to sell the property was not in fact or in law the act of plaintiff, because it was not signed or executed by him. But the evidence as presented by the record justifies no such assumption. While it is true that the agreement empowering the defendants to sell the property for plaintiff does not bear his signature, and on its face appears to carry with it no other or further authority than that which his wife by her own individual act sought to confer, the testimony of the latter, which upon this point not only stands in the record absolutely uncontroverted but without any attempt at contradiction whatever, is to the effect that her husband, who was employed in a store at Vina, and had little opportunity to give personal attention to the matter, authorized her to see the defendant, Case, "and put the property in his hands as our agent"; that she called at the office of Aitken & Case, "and Dr. Case wrote out a contract with me, and I signed it, and the arrangement was that the first time my husband was in town he would call at the office and sign it, too, and it was so understood when I left Dr. Case." She further testified that her husband approved her act in signing the agreement, and had said to her that he would himself sign it at some later time. Her testimony with reference to this agreement was corroborated by her husband, who was made to say by the attorney for the appellants himself, on cross-examination, that his wife had acted for him in the transaction. Moreover, the actions of plaintiff, as disclosed by the evidence, clearly show that he ratified the acts of his wife, both in the execution of the agreement with the defendants and in the sale of the property to them. After the property had been placed in the hands of appellants for the purpose of selling it for the plaintiff, the former advertised it over their firm name for sale for the sum of \$1,300 in the Corning "Observer," a newspaper published at Corning, and this advertisement came under the observation of

and was known to Mrs. Tate, and, while it does not directly so appear from the evidence, it is a most reasonable conclusion that plaintiff also must have known of said advertisement.

That the representation made by Case to Mrs. Tate in the conversation after the defendants had virtually made a sale of the property to Yound, to the effect that the sum of \$800 was as much as could be secured for the land, was untrue, and resorted to for no other purpose than to obtain a larger commission from the sale than the defendants could otherwise hope to receive, we think is indubitably established by the testimony of Case himself. According to his evidence, after he was undoubtedly satisfied that he could sell the land for \$1,300, he asked Mrs. Tate if she would not take less than \$800 for it, because that sum could not be obtained for it, and that she refused to accept anything less than that amount, whereupon he told her that he would take it at that figure, and requested her to call at his office with the deed transferring it to defendants. It is true that he says that this conversation occurred on June 30th, the day before the sum of \$1,300 was paid to his firm by Yound for the land; but Mrs. Tate says it took place on the evening of July 1st. The court found the fact as testified to by Mrs. Tate, and it is sufficient to say that, from a careful consideration of the whole record, we are fully satisfied and in perfect accord with that finding. It is quite evident that when Case declared to Mrs. Tate that the sum of \$800 could not be obtained for the land, that he thus made a statement having no foundation in fact, for, accepting his own word, when he discovered that she was unwilling to part with the property for less than that amount, he told her he would buy the property at that price. This, too, in the face of repeated asseverations that he would be unable to make any profit on the sale of the property, unless he could secure it for less than \$800. It is also a circumstance of considerable significance that when Case, according to his own statement as a witness, after receiving the sum of \$1,300 for the property—which event occurred, it will be recalled, before his firm acquired title to it—called on Mrs. Tate at her house, and requested her to “come in and have the deed fixed up and then we would pay her the money,” said absolutely nothing of having already sold the land to Yound. The whole affair, as it is portrayed by the evidence before us, so far as it concerns the part taken in it by the defend-

ants, appears to bear the marks of the ambidexterity by which transactions involving real estate deals are too often characterized. The evidence fully supports the findings of the trial court, and there is no reason which the record discovers justifying the fostering of any doubt that the judgment is just and that it should be sustained. Counsel have directed our attention to the law and some cases bearing thereon with reference to the elements, the existence of which is essential to the establishment of the relation of principal and agent. We have no fault to find with the principles thus stated and presented; but, under the facts as shown by the record, they have no force here. The evidence sufficiently shows that the acts of Mrs. Tate in the transaction, from its inception to its conclusion, were first authorized and subsequently ratified by the plaintiff. It shows, as we have stated, that the defendants were, as to the sale of the property, at all the times mentioned in the complaint, agents of the plaintiff, and that they did not, in the part of the transaction involving the final disposition of the land, act in good faith with their client.

Counsel have made an attempt to maintain that the agreement, by the provisions of which defendants were made the agents of plaintiff for the sale of the property, amounts only to an option to purchase said property by the defendants. This contention is not supportable. The writing, in express and unequivocal terms, empowers and authorizes defendants, as agents of the plaintiff, to sell the property "for the sum of \$1,000, or as much less as we may take at any time thereafter," and the defendants in unmistakable language agree, as agents, to sell the property and to accept as their remuneration therefor any sum which they might succeed in obtaining for it in excess of that which it was stipulated plaintiff should receive for it.

The only errors urged are based upon the insufficiency of the evidence to support the findings, and therefore, having disposed of those against the contention of appellant, it follows that the judgment and order appealed from must be affirmed, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 5, 1907.

[Civ. No. 131. Third Appellate District.—May 9, 1907.]

DANIEL SHIVELY and WILLIAM B. SHIVELY, Administrators of the Estate of W. B. SHIVELY, Deceased, Appellants, v. ROBERT LEE HARRIS and CLARA CARTER, Respondents.

ESTATES OF DECEASED PERSONS—JUDGMENT AGAINST ADMINISTRATORS—ALLOWED CLAIM—STATUTE OF LIMITATIONS.—Under section 1504 of the Code of Civil Procedure, a final judgment recovered against administrators has only the effect of an allowed claim, which must be directed to be paid in the course of administration, and no statute of limitations can run against the judgment, though more than five years have elapsed from the date when it became final, while the administration still continues.

ID.—UNTENABLE ACTION BY ADMINISTRATORS.—An action cannot be sustained by the administrators to have it declared that a judgment against the estate is barred by the statute and is not a claim against the estate.

ID.—COMPLAINT ON JUDGMENT—ABSENCE OF SUMMONS—ABANDONMENT—ELECTION OF REMEDY—CREDITOR NOT ESTOPPED.—The mere filing of a complaint upon such judgment against the administrators just before the expiration of five years from the date of its finality is not the pursuit of any remedy, and the principle of election of remedy does not apply to estop the plaintiff from claiming under the judgment as an allowed claim, where he took no further step in the action, and issued no summons therein, but practically abandoned it.

APPEAL from a judgment of the Superior Court of Humboldt County. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

Henry L. Ford, and J. S. Burnell, for Appellants.

Gillett & Cutler, for Respondents.

BURNETT, J.—There are two counts to the complaint. In the first it is alleged that the respondent Harris, on May 18, 1896, recovered a judgment against appellants as ad-

ministrators of the estate of W. B. Shively, deceased, for the sum of \$829.93, which judgment was not appealed from and became final May 18, 1897; that before the said judgment became barred by the statute of limitations, namely, on May 18, 1902, said Harris brought suit on said judgment and no summons was ever issued therein, although more than two years have elapsed since the filing of the complaint in that action; and the said Harris wrongfully maintains that by reason of said barred judgment he has a claim against the said estate and that said claim is a cloud upon said estate. In the second count it appears that respondent Clara Carter brought a similar action against appellants and recovered judgment and assigned the judgment to Harris, and in other respects the first and second counts are similar. The prayer of the complaint is: "Wherefore, said plaintiffs pray judgment of this Honorable Court that said barred judgment and barred cause of action is not a claim against said estate."

A demurrer was interposed on the ground "that said complaint does not state facts sufficient to constitute a cause of action," and was sustained by the court without leave to amend. From the judgment entered accordingly in favor of defendants, plaintiffs appealed.

There is no merit whatever in the contention of appellants. It is based entirely upon the proposition that the judgment obtained by respondents against the Shively estate was barred in five years, and that an action was necessary in order to keep alive said judgment. The truth is that the judgment against the administrators was not affected by the statute of limitations as, during the whole time, the estate was in process of administration; and it was an idle and nugatory act on the part of Harris to institute an action to renew said judgment, as his learned counsel no doubt speedily recognized, since he did nothing after filing the complaint to bring said cause to an issue.

Section 1504 of the Code of Civil Procedure provides that: "A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. . . . No execution must issue

upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment."

It would hardly be contended that while the estate was being administered the statute would run against a claim that had been allowed by the executor and approved by the judge. But by the foregoing section of the Code of Civil Procedure a judgment rendered against an executor or administrator is placed upon the same footing as such a claim. Indeed, the question has been settled by the supreme court in opposition to the claim of appellants. In *Estate of Schroeder*, 46 Cal. 307, it is said: "We think there are several reasons why the statute does not run pending the administration against a claim allowed. . . . Other reasons might be adduced, but these are sufficient to show that the statute of limitations ceases to run during a pending administration against claims duly allowed." The opinion shows that the court was considering judgments rendered against administrators and not claims that were allowed by said administrators. However, as stated, the doctrine applicable to both is the same. (See, also, *In re Arguello*, 85 Cal. 151, [24 Pac. 641], *Wise v. Williams*, 88 Cal. 30, [25 Pac. 1064], and *Estate of More*, 121 Cal. 635, [54 Pac. 148].)

The other point that "the defendant Harris elected his remedy by the commencement of the action and he is now barred by his election" is equally without merit. It is based upon the proposition that "where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers to adopt" (*Rodemund v. Clark*, 46 N. Y. 354); or, as stated in another case: "It is one of the very elements of the law that when a suitor reaches the parting of the ways in the pursuit of inconsistent remedies he must elect which road he must follow. The first step taken is an election, and the election, when made, is irrevocable."

The principle is sound but it is manifest that it has no application to the case at bar. There was no choice here between two inconsistent remedies. The course pursued by Harris in bringing the second suit was not in pursuit of any remedy at all. It had no effect whatever upon the judgment against the estate, and he very properly abandoned the action before bringing the appellants into court. The mere filing

of a complaint, which could not be sustained and which was abandoned, cannot be urged as an estoppel against the assertion of a judgment against the estate which has not been satisfied and still remains in full force and effect.

The judgment is affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 291. Second Appellate District.—May 11, 1907.]

J. W. FREEMAN, Respondent, v. ROBERT A. BROWN,
Appellant.

NEW TRIAL—STATEMENT—OMISSION OF SPECIFICATIONS—REFUSAL TO ALLOW AMENDMENT—DISCRETION—REVIEW UPON APPEAL.—Though an order refusing to allow a supplemental amendment to the statement on motion for new trial to add thereto specifications wholly omitted therefrom by oversight and excusable neglect, under section 478 of the Code of Civil Procedure, is reviewable upon appeal therefrom, yet such order was addressed to the discretion of the trial court, and where the review upon appeal shows no abuse of discretion, the order refusing to grant the relief will be affirmed.

APPEAL from an order of the Superior Court of Los Angeles County, refusing leave to amend a statement on motion for a new trial. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

George L. Keefer, and Walter L. Bowers, for Appellant.

The court should have granted the leave to amend in furtherance of justice, and it was error not to do so. (Code Civ. Proc., sec. 473; *Butler v. King*, 10 Cal. 343; *Cook v. Spears*, 2 Cal. 409, 56 Am. Dec. 348; *Linhart v. Buiff*, 11 Cal. 280; *Smith v. Yreka etc. Co.*, 14 Cal. 202; *McMillen v. Dana*, 18 Cal. 349; *Roland v. Kreyenhagen*, 18 Cal. 457; *Pierson v. McCahill*, 22 Cal. 128; *Gould v. Stafford*, 101 Cal. 32, 35 Pac. 429; *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227; *City Improvement Co. v. Emmons*, 138 Cal. 300, 71 Pac. 332; *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439.) When it is not done in

furtherance of justice it is error. (*Connolly v. Peck*, 3 Cal. 82; *Tyron v. Sutton*, 13 Cal. 494; *Hooper v. Wells-Fargo Co.*, 27 Cal. 35, 85 Am. Dec. 211; *Farmers' etc. Bank v. Stover*, 60 Cal. 388; *Marr v. Rhodes*, 131 Cal. 267, 63 Pac. 364; *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278.) The statement may be amended to insert all the grounds of the motion and specifications after the time for filing the statement has passed. (*Valentine v. Stewart*, 15 Cal. 387, 396; *Loucks v. Edmondson*, 18 Cal. 203; *Lucas v. City of Marysville*, 46 Cal. 200; *Smith v. City of Stockton*, 73 Cal. 206, 14 Pac. 675.) The oversight of counsel is sufficient ground for the amendment. (*Kirstein v. Madden*, 38 Cal. 158.) It is right and proper to allow the amendment so that the motion for a new trial may be heard upon its merits. (*Clark v. Rauer*, 1 Cal. App. Dec. 753.)

H. M. Barstow, for Respondent.

No appeal lies from the order in question. (*Melde v. Reynolds*, 120 Cal. 234-238, 52 Pac. 491.) Oversight unexplained is not an excuse. (*Bailey v. Taaffe*, 29 Cal. 425.)

ALLEN, P. J.—Appeal from an order denying the defendant's application for leave to amend proposed statement on motion for a new trial.

Upon the trial of the action in the court below judgment was entered against defendant, and in due time he served his notice of intention to move for a new trial and served and filed his proposed statement on such motion, which statement omitted to specify the particulars wherein the evidence was insufficient to justify the findings, and wherein the decision and judgment was against law, and the errors in law occurring at the trial and excepted to by the defendant. When the settlement of the statement came on for hearing defendant asked leave to amend the proposed statement by filing a supplemental statement setting forth the omissions hereinbefore referred to. This application was supported by an affidavit of one of the attorneys, "that by reason of an oversight and through press of business affiant omitted to specify in the proposed statement the particulars wherein the evidence was insufficient to justify the findings, wherein the decision and judgment was against law, and the errors

in law occurring at the trial and excepted to by defendant; that said errors and omissions occurred entirely through an oversight and through press of business which caused affiant to overlook said error and omission." The court denied this leave to amend and file supplemental statement, from which order defendant appeals.

It is settled that the order of a court made in the exercise of its discretionary power denying relief of this character is reviewable upon appeal (*Murphy v. Stelling*, 138 Cal. 641, [72 Pac. 176]), and in this case such appeal was taken in time. (*Pollitz v. Wickersham*, 150 Cal. 138, [88 Pac. 911].) The relief sought by defendant was from the result of mistake, inadvertence and excusable neglect under section 473, Code of Civil Procedure. The court has the power so to relieve, but the granting of such relief rests in the sound discretion of the court. "Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must, of necessity, be left largely to the court to which application is made; and it is well settled that this court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear abuse of discretion is apparent." (*Vinson v. Los Angeles Pac. R. Co.*, 147 Cal. 479, [82 Pac. 54].) In this last case, where the affidavit showed that the press of professional duties occasioned the neglect, it was held not an abuse of discretion to grant relief. In this case, however, press of professional duties is not assigned, but press of business, which may comprehend matters foreign to the duties of an attorney, is urged. The whole matter, however, was for the trial court, and we cannot say from the meager affidavit presented and relied upon that the court abused its discretion in denying the relief sought.

The order denying leave to file supplemental statement is affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 311. Second Appellate District.—May 13, 1907.]

YICK WO, Respondent, v. M. E. UNDERHILL, Administratrix of Estate of J. H. UNDERHILL, Deceased, Appellant.

ACTION AGAINST ADMINISTRATRIX—REJECTED CLAIM—ACCOUNT—EVIDENCE—BOOK OF ACCOUNTS.—In an action against the administratrix upon a rejected claim for meals furnished and money loaned to the decedent, the plaintiff's book of accounts was properly admitted in evidence to show the number of meals furnished to the employees of the deceased at his request, in connection with evidence tending to show that it was a book of original entries, and was fairly and honestly kept. What credit was to be given to the entries was for the trial court to determine.

ID.—BOOK KEPT IN CHINESE CHARACTERS—TRANSLATION.—Where the book of accounts was kept in Chinese characters, there was no error in permitting a witness to translate its entries to the court.

ID.—CORROBORATION OF ACCOUNT.—*Held*, that there was evidence in the record outside of the book of account which tended to sustain the finding of the court as to the value of the meals furnished; and that the court properly allowed one of the employees of the deceased to testify that he was paid a fixed sum and his board by the deceased, and that this board was furnished by plaintiff.

ID.—MONEY LOANED—BOOK OF ACCOUNTS—SUFFICIENCY OF EVIDENCE.—An entry in the book of accounts is not proof of money loaned; but it is sufficient to sustain a finding thereupon that there is ample proof outside of the book to show that plaintiff made the loan, and that it was unpaid.

APPEAL from an order of the Superior Court of Kern County denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

J. W. P. Laird, and E. B. Coil, for Appellant.

No sufficient foundation was laid for the admission of the books. (*Watrous v. Cunningham*, 71 Cal. 32, 11 Pac. 811; *Vosburgh v. Thayer*, 12 Johns. 461; *Morrell v. Whitehead*, 4 E. D. Smith, 239; *Conklin v. Stambler*, 8 Abb. Pr. 395.) The books were not admissible to prove the loan. (2 Wigmore on Evidence, secs. 539, 1549; *Collins v. Bard*, 2 Cal. 421; *Le*

France v. Hewitt, 7 Cal. 186; *Veiths v. Hagge*, 8 Iowa, 187.) Nor to prove entries against third persons. (2 Wigmore on Evidence, secs. 1541, 1549.)

W. W. Kaye, and Thomas Scott, for Respondent.

The plaintiff was a competent witness to prove the correctness of his book of original entries, kept by himself, as against the decedent. (*Landis v. Turner*, 14 Cal. 573; *Roche v. Ware*, 71 Cal. 375, 60 Am. Rep. 539, 12 Pac. 284; *Cowdery v. McClesney*, 124 Cal. 363, 367, 57 Pac. 221.)

ALLEN, P. J.—Appeal from an order denying a new trial. Plaintiff was the keeper of an eating-house at Mojave, and Underhill, deceased, was a saloon-keeper and ice dealer in the same town. Plaintiff issued meal tickets representing twenty-one meals for a consideration of \$5. Some of Underhill's employees took their meals at plaintiff's place of business. For these meals tickets were issued to Underhill and he delivered the same to his employees, and when he settled with them he took from their wages the price of the meals so furnished by plaintiff.

The court finds that the price and value of such meals so furnished Underhill's employees was \$80; and, in addition, that during Underhill's life plaintiff loaned him \$500 in money.

Appellant was duly appointed administratrix of Underhill's estate and plaintiff duly presented his claim against the estate for the price and value of such meals so furnished and the amount of such loan; and the same being rejected, he brings this action. The court gave judgment for plaintiff. No appeal from the judgment was perfected within time, and the only appeal is from the order denying a new trial.

It is urged that the court erred in permitting plaintiff's book of accounts to be read in evidence, because no preliminary proof was first made entitling it to be received. The book was kept in Chinese characters, and plaintiff was properly permitted to testify as to his business; that he kept the book offered in evidence in connection with his business; that this book contained the original entries made at the time of the transactions; that he kept no other books; that when he delivered a meal ticket he immediately put it down in the

book; that the entries were all made by himself. We think this sufficient preliminary proof, coupled with the evidence of other witnesses that the entries as to the price of meal tickets corresponded with the fixed charge therefor and that plaintiff wrote part of the entries at the time of the transaction in the presence of such witnesses and in the book offered in evidence; all of which tended to show that the book was fairly and honestly kept. What credit should be given such entries in such book was for the trial court to determine. Were it even conceded that plaintiff was not competent to testify as to its correctness and fairness, an attempt to prove such fact by plaintiff himself was abortive. A question was asked him in relation thereto and objected to, but the answer was not responsive and established nothing, and no prejudicial error is apparent in the ruling of the court. There is some evidence in the record outside of this book which tended to sustain the finding of the court that meals to the value of \$80 were furnished on and before the twelfth day of June, 1904, and the price thereof unpaid.

There was no error in permitting a witness to translate to the court this book so kept in Chinese characters.

There was no error in permitting the witness Taylor to testify that he was paid a fixed sum and his board by Underhill and that this board was furnished by plaintiff. It was competent evidence and tended to support plaintiff's contention.

The entry of cash loaned which appears in the book of accounts received in evidence would not of itself justify a finding in that regard. The book was competent as to the transactions connected with the plaintiff's business, and an entry therein disconnected from such business would not affect its admissibility as to those matters properly entered, but such entry was not proof of the loan. There is ample proof outside of the book to warrant the finding that plaintiff made the loan and that it was unpaid. While much of the evidence in the case was conflicting, it was for the trial court to determine the facts from such evidence, and such findings will not be disturbed.

The further point is made that plaintiff declares upon an indebtedness existing June 12, 1904, while the findings are that the indebtedness on account of the meals furnished was contracted between February 12th and June 21st, 1904, the

latter date being that of the decease of Underhill. The record shows that \$80 of this indebtedness was contracted on and before the date alleged in the complaint, and that so much thereof as was contracted after June 12th, to wit, \$20 thereof, was not considered and did not enter into the judgment. The court only rendered judgment for that portion of the account which was contracted within the time alleged in the complaint.

We find no error in the record prejudicial to appellant, and the order is affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 317. Second Appellate District.—May 13, 1907.]

S. M. PINKIERT, Respondent, v. D. S. KORNBLUM, Appellant.

ATTACHMENT—MOTION TO DISSOLVE—INSUFFICIENT COMPLAINT—DEFECT NOT CURED.—Though a motion to dissolve an attachment cannot be made to serve the purposes of a demurrer to the complaint, and an amended complaint will support it if a defective complaint has been cured by amendment, yet, if the complaint fails to state a cause of action, and is incurable, or if the plaintiff fails to amend an insufficient complaint before decision of the motion, it will be presumed that he cannot do so, and, in either case, the attachment must be dissolved.

ID.—COMPLAINT SHOWING MONEY PAID UNDER CONTEST FOR SHARES OF STOCK NOT DELIVERED—ALTERNATIVE REMEDY—RESCISSION—DAMAGES.—Where the complaint shows that plaintiff fully paid money under a contract for shares of stock, which were not delivered, it might state a cause of action entitling plaintiff to rescind the contract for failure of consideration under section 1689 of the Civil Code, in which case he would be entitled to judgment for the return of the money paid, or to affirm the contract, and recover damages for its breach, measured by section 3336 of the Civil Code.

ID.—COMPLAINT FOR DAMAGES INSUFFICIENT TO SUPPORT ATTACHMENT.—If the complaint stated a full cause of action to recover damages for the breach of the contract, which it fails to do, it could not, in such case, support an attachment for that cause of action.

ID.—INSUFFICIENT COMPLAINT FOR RESCISSION.—If the complaint be considered as a complaint to rescind the written contract for failure

of consideration, it is insufficient as lacking allegations to show that the time for performance of the contract on defendant's part, in which to cause the stock to be issued in a proposed corporation then in process of formation, had elapsed before his refusal of performance or to show the stage of its organization, or when or where it was to be organized.

ID.—REASONABLE TIME FOR PERFORMANCE—TWENTY DAYS NOT SUFFICIENT AS MATTER OF LAW—FACTS MUST BE AVERRED.—The defendant was entitled under the contract, which fixed no time for performance, to a reasonable time therefor. It cannot be said as matter of law that twenty days after date of the contract was a sufficient time in which to procure the issuance of the stock, and any facts showing the contrary or that the failure was caused by defendant's act, must be alleged.

APPEAL from an order of the Superior Court of Los Angeles County denying a motion to dissolve an attachment. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Goldberg & Meily, for Appellant.

James L. Irwin, for Respondent.

TAGGART, J.—Appeal from an order denying motion to dissolve an attachment.

The verified complaint alleges that on the ninth day of May, 1906, plaintiff paid to defendant the sum of \$1,000, in consideration of which defendant agreed, in writing, to issue, or cause to be issued, to plaintiff five thousand shares of the capital stock of a corporation, then in process of organization, each share of the par value of one dollar.

That on the twenty-ninth day of May, 1906, defendant refused to perform said contract, or to return the said \$1,000. That plaintiff thereupon demanded the return of said sum and defendant refused and refuses, etc., to pay the same to plaintiff. The demand is for judgment against defendant for \$1,000 and costs of suit.

The affidavit avers an indebtedness of \$1,000 "upon an express contract for the direct payment of money, to wit: For money obtained by said defendant at his special instance and request from said plaintiff," etc.

The motion to dissolve the attachment was based upon two grounds, to wit: That the amount of plaintiff's claim as stated in the affidavit does not conform to plaintiff's complaint, and that the complaint does not state facts sufficient to constitute a cause of action.

There appears to be a variance between the complaint and affidavit, but it is not the one specified in the motion. If the complaint stated sufficient facts to entitle plaintiff to recover at all, it would not state a cause of action on an express contract, but we do not regard this as material here.

Plaintiff fully paid for personal property which was never delivered to him. He was entitled therefore to rescind the contract for failure of consideration (Civ. Code, sec. 1689), or to affirm the contract and bring an action for its breach (Civ. Code, sec. 3309). In the former case, he would be entitled to a judgment for the return of the money paid; in the latter, to a judgment for damages measured by section 3336 of the Civil Code. The complaint is entirely lacking in the allegations necessary to the last-mentioned cause of action, and if sufficient to state such a cause of action it would not support an attachment. Considered as a complaint to rescind, it appears also lacking in allegations necessary to show that the time for performance on the defendant's part had elapsed.

His refusal to comply with plaintiff's request to perform on May 29, 1906, may have been entirely consistent with good faith and intent on his part to perform his part of the contract within the time allowed by law. The contract provided no time within which he should cause the stock to be issued and delivery thereof made. The stage of the organization of the corporation then in progress does not appear. There is no allegation as to when or where it was to be organized. The law would allow at least a reasonable time to defendant to act, and without any information as to the time required to bring about the conditions requisite to the issuance of the stock, it cannot be said that twenty days was such reasonable time. If the corporation was organized at the time of the demand, it should have been alleged. If it was not, and this was because of defendant's act, the facts should have been set forth.

While it is true that the motion to dissolve an attachment cannot be made to serve the purposes of a demurrer to the

complaint (*Kohler v. Agassiz*, 99 Cal. 9, [33 Pac. 741]), and an amended complaint will be held to support an attachment issued on a complaint originally defective which has been cured by an amendment (*Hale v. Milliken*, 142 Cal. 138, [75 Pac. 653]), yet, if the complaint fails to state a cause of action and is incurable, the attachment must be dissolved. If a motion to dissolve is made on this ground the plaintiff must amend his complaint before the decision of the motion to dissolve (*Hathaway v. Davis*, 33 Cal. 169), or it will be presumed that he cannot do so.

The record discloses no amendment or attempt to amend; therefore the attachment should have been dissolved.

The order denying the motion is reversed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 255. Third Appellate District.—May 16, 1907.]

U. G. PETERSON et al., Respondents, v. ADRIEN CHAIX
et al., Appellants.

CONTRACT FOR SALE OF GRAPES—"ABOUT 250 TONS MORE OR LESS"—

PAROL EVIDENCE—ENTIRE CROP.—Under a written contract for the sale of "about 250 tons grapes more or less, at the stipulated price of \$27.00 per ton cash after delivery, grapes to be of sound quality," parol or extrinsic evidence is not admissible to show that the sale was intended to include the entire crop of grapes grown in the vineyards of the sellers, including 166 tons additional to the quantity specified.

1D.—IMPLIED AGREEMENT.—Though there is no express agreement to purchase the grapes, the law implies an agreement by the purchasers to pay at the stipulated price for all grapes received by them of the quality named, and when nearly 257 tons were accepted, the law implies no agreement to accept any grapes in excess thereof.

1D.—GENERAL RULE AS TO EXTRINSIC EVIDENCE—EXCEPTIONS.—Though, as a general rule, where a contract appears to be partly in writing and partly in parol, and is uncertain in its terms, parol evidence is admissible to show what the stipulations were, and in construing an uncertain contract parol evidence is admissible to show the circumstances under which the contract was made, etc., yet neither

of these rules applies where the contract, with what the law implies from its terms as a necessary part thereof, is certain, clear, definite, complete and unambiguous, in which case it cannot be added to, varied or contradicted by extrinsic evidence.

ID.—CONSTRUCTION OF CODE PROVISIONS.—Section 1860 of the Civil Code, as to parol evidence of the circumstances, etc., is to be restricted in its application, so as to harmonize with section 1625 of that code, making a written contract supersede all oral negotiations, and also with section 1856 of the Code of Civil Procedure, allowing a mistake, imperfection, or invalidity of the contract to be put in issue by the pleadings.

ID.—TERMS OF CONTRACT NOT INTRODUCING AMBIGUITY—"ABOUT"—"MORE OR LESS."—It is settled, upon authority, that the terms "about" and "more or less," used in the contract in question, introduces no ambiguity, and that extrinsic evidence of previous or contemporaneous conversations is not admissible to show what was meant by their use when the contract does not refer to independent circumstances to identify the goods sold.

APPEAL from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial Emmett Seawell, Judge.

The facts are stated in the opinion of the court.

E. B. Young, and J. W. Oates, for Appellants.

J. R. Leppo, for Respondents.

CHIPMAN, P. J.—In their petition for rehearing plaintiffs urged that the written memorandum did not constitute the whole of the agreement between the parties; but that there were conditions, resting in parol, which were an essential part thereof, and that the case presents an instance "where a verbal contract is entire, and a part only in part performance is reduced to writing," and hence parol testimony was admissible to establish the complete agreement. We do not think that an extended discussion is called for in disposing of plaintiffs' contention. It may be conceded, and as we understand defendants' position they admit, that where the contract appears to be merely an incomplete memorandum, or to be partly in writing and partly in parol, extrinsic evidence is admissible to show what the mutual stipulations were. But this is true only as to such matters concerning which the

written memorandum is silent or as to which terms are used which import ambiguity or uncertainty—i. e., which on their face admit of doubt as to what the parties meant by their use. There is another principle to be observed, namely, that whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed; and to the extent that the contract, with that which the law implies, is clear, definite and complete, it cannot be added to, varied or contradicted by extrinsic evidence. A still further principle is not to be overlooked, namely, extrinsic evidence is not admissible to show that a contract was partly written and partly oral, if the matter proposed to be made part of the contract by such evidence is inconsistent with the terms of the writing. We may add a still further and salutary rule, which has been recently given careful and extended discussion by this court, in the case of *Hale Bros. Inc. v. Milliken*, ante, p. 344, [90 Pac. 365], and it is this: While it is competent in construing a contract to show the situation of the parties, the subject matter of the contract, and acts of the parties under the contract, as tending to show how they understood it, still this cannot be done to the extent of varying or contradicting a written contract, where such contract is certain, complete and unambiguous. The foregoing principles are stated to be the law in the very well reasoned case, supported by cited authorities, of *Faulkner v. Smith Wallpaper Co.*, 88 Iowa, 169, [45 Am. St. Rep. 230, 55 N. W. 200]. In that case the memorandum read as follows: "On demand I promise to deliver to the order of E. F. Fisher Eight hundred dollars (less twenty per cent discount), in wall paper, at wholesale prices, good, clean, assorted stock out of my store on Fifth Street, Des Moines, Iowa. No storage. Lew Smith Wall Paper Co." The defendant pleaded that, at the date of making the order, and of its acceptance by Fisher, the wholesale price for good, clean, assorted wallpaper, and the price upon which said order was based, and at which said paper was to be delivered by the defendant to, and accepted by, the payee was agreed upon, and set forth on a card then shown Fisher; that the schedule of prices printed upon the card was then agreed upon between the parties to said order as the then wholesale prices at which paper was to be delivered, and said card accompanied the order, as a part of it, and a part of the

contract fixing the wholesale price of said paper. Defendant was permitted to prove at the trial that, when the contract was made between the parties, he handed the plaintiff's assignor a card, having printed thereon a price list of wall-paper, and that he was to take the paper mentioned in the contract at the prices stated on the card. It was not attached to or made part of the written contract or referred to in it. The evidence was objected to, as tending to vary and contradict the written contract of the parties. Defendant claimed that the evidence was admissible as constituting part of the contract; that, though it was on a separate piece of paper, still it was in fact but a part of and altogether constituted but one contract. The Iowa supreme court held that the lower court erred in admitting the evidence. In speaking of the terms "wholesale price," the court said: "There is no claim that the schedule of prices, as set forth on the card introduced in evidence, was to be a part of the written contract, and was omitted by accident, mistake, oversight or fraud. No such issue is presented. The evidence objected to would work a material change in the terms of the contract. It shows that the paper was to be received at a price which was agreed upon when the contract was executed, and outside of the provisions of the written contract. It measured the amount of paper that should be received under the written contract by the then wholesale market price, when the written contract measured the amount of paper to be delivered under it by the wholesale price at the time of demand made for the goods."

In the case here the sole controversy relates to the quantity of grapes which defendants agreed to receive. It is true the contract is silent as to the agreement of defendants to receive any of the grapes. But they did receive them and no question arises as to this. The law would have implied an agreement to pay at the stipulated price for all grapes received by them of the quality named. True, also, that the contract is silent as to the varieties of the grapes, but as all bore the same price and as no dispute arose upon this point the fact is immaterial. So, also, as to the omission to state when the delivery was to be made or whence the grapes were to come. Reduced to the actual matter in controversy, the sole dispute was whether plaintiffs could prove by parol testimony that

defendants had agreed to receive all of plaintiffs' crop, or to receive 166 tons of grapes in excess of the "250 tons more or less," specified in the written memorandum. It is not necessary to repeat the observations upon this point heretofore made. We are still of the opinion that extrinsic evidence was not admissible to materially add to the quantity mentioned in the memorandum. The principle invoked by respondents, when rightly applied, affords them no relief.

For the reasons stated in our former opinion and herein, the judgment and order are reversed.

Hart, J., and Burnett, J., concurred.

The following is the former opinion above referred to, rendered February 20, 1907:

CHIPMAN, P. J.—Action upon a contract for the sale of certain grapes. The cause was tried by the court without a jury and plaintiffs had judgment, from which and from the order denying their motion for a new trial defendants appeal.

It is averred in the complaint that on September 22, 1902, plaintiffs entered into a contract with defendants whereby plaintiffs agreed to sell and deliver to defendants at their winery in Santa Rosa, and defendants agreed to buy and receive, the crop of grapes owned and grown by plaintiffs on their vineyards near said city, for the season of 1902, said grapes to be of sound quality but not required to contain any specified percentage of sugar, and that defendants agreed to pay to plaintiffs for the same, cash on delivery, the sum of \$27 per ton; that prior to October 27, 1902, plaintiffs delivered to defendants, under said contract, 256.817-1000 tons of said grapes and defendants then and there duly received and accepted the same under said contract, amounting to \$6,934.05; that plaintiffs were ready and willing to deliver the balance of their said crop to defendants, but defendants gave plaintiffs notice that they, defendants, "would not receive or accept or pay for any more of the said crop and then and there refused to receive or accept any more of said grapes"; that there remained undelivered of said crop 166.155-1000 tons of grapes of quality called for by said contract; that after defendants' said refusal, to wit,

on October 28, 1902, plaintiffs sold to the best advantage said remaining grapes (except ten tons hereinafter mentioned), receiving therefor the sum of \$20 per ton, amounting in the aggregate to \$3,123.10, and that the difference between said sum and the sum agreed by defendants to be paid is \$1,093.08; that there remained undelivered to defendants ten tons of grapes which by reason of defendants' said refusal became decayed and valueless.

Defendants by their answer admitted the delivery to them, agreeably to the contract, of 239.291-1000 tons, but alleged that 17.495-1000 tons delivered to defendants prior to August 27, 1902, were of inferior quality, for which defendants agreed to pay the reasonable market value, which they allege was and is \$317.43, and admit an indebtedness of \$6,778.30, which sum they allege they tendered to plaintiffs prior to the commencement of this action, and that plaintiffs refused to receive the same, and they aver a present willingness to pay said sum to plaintiffs; defendants deny specifically the allegations of the complaint except as to the above admissions.

The court made findings in accordance with the facts set forth in the complaint and found that "no contract or agreement other than the one above mentioned (i. e., alleged in the complaint) was ever made between plaintiffs and defendants for the sale and purchase of plaintiffs' said crop of grapes for the season of 1902." The court also found that no tender had been made by defendants, as to which finding the matter may be dismissed, as it is not now claimed that any tender was made by defendants.

It appeared by the opening statement of counsel for plaintiffs and during the examination of the first witness called by plaintiffs that a written contract was entered into by the parties, defendants acting through one Hood, admittedly their agent, plaintiffs, however, claiming that it was but a part of the contract. This instrument bears date as alleged of the contract pleaded in the complaint, and is as follows:

"Santa Rosa, Sept. 22nd, 1902.

"In consideration of one (\$1.00) dollar, paid to me in hand, I sell and promise to deliver to CHAIX & BERNARD at James G. Hood's winery at Santa Rosa, Cal., about 250 tons grapes more or less tons of grapes, at the stipulated price of \$27.00 per ton cash after delivery.

~~"Grapes to be of sound quality, and not less than (22) Twenty-Two per cent of sugar."~~

"Seller, — PETERSON BROS.

"Buyer, — JAMES G. HOOD."

The last clause shown in the contract as erased was so erased before signing.

Over the objection of defendants, the plaintiffs were permitted to introduce the testimony of several witnesses as to the circumstances leading up to the signing of the above memorandum; to show that the sale was intended to include the entire crop of plaintiffs grown upon their vineyards; explaining the varieties of grapes and estimated tons of each; that the grapes were not to be subject to the sugar test; in short, witnesses were permitted to testify to all the conversations and details relating to the transaction that took place during the negotiations and contemporaneously with the signing of the contract. Upon objections being interposed and after argument, the court remarked: "My understanding is that all these matters of the conversation precedent are merged in a written contract, but under section 1860 of the Code of Civil Procedure I will permit the question and you can take your exception." The objections and ruling ran to all this line of testimony, of which there was much, and present the principal question before us. Respondents' view of the matter as stated in the brief is that "the writing of September 22d is only a commercial memorandum, and does not purport to fully set forth all of the contract of sale and purchase of the grapes," and hence all the circumstances attending the making of the contract may be inquired into.

Section 1860, Code of Civil Procedure, upon which reliance is placed, reads as follows: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." This section is not to be read as applicable to every contract that may come before the court for interpretation. It has its limitations and must be read in connection with other provisions of our code. To give it a literal and universal application would bring it into direct conflict with section 1856, Code of Civil Procedure, which provides: "When the terms of an agreement have been reduced to writing by

the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings; 2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud." In the present case there is no allegation or proof of mistake, of invalidity of the contract, or of fraud.

Section 1625, Civil Code, must also be read and harmonized with section 1860, Code of Civil Procedure. It reads: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." From these and other sections which might be cited, it is plain that section 1860 is to be restricted in its application.

The court said in *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 225, [41 Pac. 876, 877]: "If the language of the contract be, as defendant contends, plain and unambiguous, and susceptible of but one construction, then the objection was good, and the evidence properly excluded. If, however, the language employed be fairly susceptible of either one of the two interpretations contended for without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties." (Citing Code Civ. Proc., sec. 1860, and cases.)

In *Johnson v. Pugh*, 110 Wis. 167, [85 N. W. 641], it was broadly contended that testimony of the circumstances surrounding and leading up to the making of a written contract is always admissible, not for the purpose of changing or vary-

ing the terms of the written instrument, but for the purpose of putting the court in possession of the circumstances of the parties at the time of the making of the contract. "Not so," said the court. "Where there is no ambiguity in the contract, either in its literal sense or when it is applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters. Where such ambiguity does exist, then evidence of the circumstances under which the contract was made is proper to enable the court in the light thereof to read the instrument in the sense the parties intended, if that can be done without violence to the rules of law."

The meaning of section 1860 may be discovered in the light of the foregoing decisions. Before resort can be had to extrinsic evidence the language employed in the contract must not only be "fairly susceptible of either one of the two interpretations contended for," but this must be "without doing violence to its usual and ordinary import," and it must also be "without doing violence to . . . some established rule of construction." (*Balfour v. Fresno L. & I. Co.*, *supra*.) It is no part of the office of construction to add to the contract or take from it, but it is to ascertain what the parties intended by what they have said. If there be no ambiguity in the contract, it must speak for itself. It is true, as provided in section 1861, Code of Civil Procedure, that although "the terms of a writing are presumed to have been used in their primary and general acceptance," still evidence is admissible to show "that they have a local, technical or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly." Such was the case of *Higgins v. Cal. Petroleum etc. Co.*, 120 Cal. 631, [52 Pac. 1080], cited by respondents, where the terms used were "short tons." It was there held that it is not necessary that the contract should expressly indicate a local, technical, or peculiar signification, but "that it may be shown by evidence that the language is used in a technical, local or peculiar sense, and not merely that evidence may be introduced to show what such meaning is, when language is so used." That case, however, was not intended to change the rules above mentioned. The rules stated in sections 1860 and 1861 do not apply where the terms used in the contract are free from ambiguity or are not used in a technical, local or peculiar signification. The code rule enunciated in section 1856, Code of Civil Procedure, has been frequently enforced by our supreme court, and was

the rule before being incorporated into the code. (*Goldman v. Davis*, 23 Cal. 256. See of later cases: *Schurtz v. Romer*, 82 Cal. 474, [23 Pac. 118]; *West Coast L. Co. v. Apfield*, 86 Cal. 335, [24 Pac. 993]; *Beall v. Fisher*, 95 Cal. 568, [30 Pac. 773]; and also *McDonald v. Poole*, 113 Cal. 437, [45 Pac. 702], construing sec. 1625, Civ. Code.) Among cases in other jurisdictions the following may be consulted with profit; they come down finally to the simple proposition that where there is no uncertainty of sense there is no room for construction: *Hart v. Hart*, 117 Wis. 639, [94 N. W. 890]; *Fawcner v. Smith W. P. Co.*, 88 Iowa, 169, [45 Am. St. Rep. 230, 55 N. W. 200]. If it be claimed that the contract is incomplete, it must so appear upon inspection before parol evidence is admissible to complete it, and such evidence must be consistent with and not contradictory of it. (*Brantingham v. Huff*, 174 N. Y. 53, [95 Am. St. Rep. 545, 66 N. E. 620]; *Ferguson C. Co. v. Manhattan T. Co.*, 118 Fed. 791.)

In the case here the only terms which have given rise to any controversy are the terms "about" and "more or less" as applied to the quantity of grapes sold. The sugar test was stricken out, and it so appears upon the face of the contract. There is no uncertainty that the plaintiffs agreed to sell and deliver 250 tons of grapes at a place named and that the buyer was to pay \$27 per ton upon delivery, the grapes to be of sound quality. The material question which has arisen between the parties as to the meaning of the contract is the single question of quantity agreed to be sold and delivered. Parol evidence was not admitted to show that the terms "about" and "more or less" had a local or technical or otherwise peculiar signification and were so understood in the particular instance, but the evidence was introduced to prove that it was part of the agreement that the buyer should receive all the grapes grown by the seller on the several vineyards mentioned by the witnesses; that when the matter of quantity in the vineyards was under discussion, and the estimate of plaintiffs was from 250 to 290 tons, defendants said it would make no difference as to the amount, for they would take all the grapes that plaintiffs had. Plaintiffs made an unsuccessful effort to show by parol that the terms "more or less" had by custom among buyers and sellers of wine grapes a local and peculiar signification which meant all grapes grown by the seller. Defendants objected to the

testimony, however, and the objection was sustained. It seems to us that the conversations occurring when the parties were estimating the quantity thought to be on the vines, should be regarded in the light of opinions which were to form some safe quantity to name in the contract which plaintiffs were willing to agree to sell and deliver and not as part of the contract itself. So important a matter as that the buyers agreed to take all the grapes grown by the sellers, regardless of quantity, should have found expression in the contract, either directly or by introducing some extrinsic ambiguity, and not having been so expressed, cannot now be added thereto by parol. This additional quantity is 166 tons, or sixty per cent greater than the quantity stated in the contract by the sellers. Possibly had this large excess been suggested during these conversations the buyers would have hesitated to say that it made no difference as to the quantity. However this may be, the terms "about" and "more or less" have frequently found their way into contracts and courts have without disagreement held that they introduce no ambiguity and that extrinsic evidence of previous or contemporaneous conversations is not admissible to show what the parties meant by their use, unless the contract on its face makes reference to some independent circumstances to identify the goods sold.

Both parties cite *Brawley v. United States*, 96 U. S. 168. This is a leading case and has been often cited. It lays down certain rules for the guidance of courts in the construction of similar contracts. In that case the contract was to deliver at a certain army post "880 cords of sound, first quality, of merchantable wood, more or less, as shall be determined to be necessary, by the post-commander, for the regular supply," etc. It appeared that the quarter-master's department had made an estimate of the quantity required and had accordingly advertised for 880 cords; the bids were opened April 15, 1871, and the contract was awarded May 6th, but though dated on that day was not executed until June 14th. About June 18th the post-commander notified plaintiff, the claimant, that but 40 cords of wood would be required and forbade his hauling any more to the government yard. He had, however, at great expense, before the contract was signed, gone forward and cut the full quantity and hauled it near to the yard. The court held that "the substantial en-

gement was to furnish what should be determined to be necessary by the post-commander for the regular supply for the year," and plaintiff failed in his action. The opinion is valuable for its concise and accurate statement of the rules governing similar contracts. Said the court, by Mr. Justice Bradley:

"Where a contract is made to sell or furnish certain goods identified by independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases, the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity.

"But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.

"If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. So where a manufacturer contracts to deliver at a certain price all the articles

he shall make in his factory for the space of two years, 'say a thousand to twelve hundred gallons of naphtha per month,' the designation of quantity is qualified not only by the indeterminate word 'say,' but by the fair discretion or ability of the manufacturer, always provided he acts in good faith. . . .

"Reference is made to the previous negotiations which led to the making of the contract, the bid of the claimant, the fact that the contract was awarded to him on his bid as early as May, and that, on the faith and expectation that the quantity named would be wanted, he had cut the eight hundred and eighty cords of wood before the contract was signed.

"All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

The importance of the question and the earnest contention of respondent that the lower court ruled correctly is our justification for a still further notice of some of the many cases in which the matter has been considered. In *Shickle v. Choteau H. & V. Iron Co.*, 84 Mo. 161, the opinion, as rendered in the court of appeals, 10 Mo. App. 242, was adopted. The contract read:

"Your proposal of four hundred tons, more or less, of wrought scrap, consisting of one, one-half and three-eighth plate blacksmith scrap, and lot of gas pipes from Southern Hotel, and other scrap, as shown your Mr. Fusz, at twenty-two dollars per net ton in our yard, is accepted. You can commence hauling same at your convenience,"

The court said: "Defendant admitted the purchase and receipt of the iron at the price mentioned and nonpayment of the balance claimed; but by way of counterclaim alleged that said iron was delivered in part performance of the contract above under which they claimed that it was agreed that defendants were to have all the scrap iron in plaintiff's yard.

"Evidence was offered to show that at the time the terms were agreed upon the parties were in the yard containing the scrap and made estimates of the quantity, and defendants offered to prove that it was then agreed that they were to have all the scrap iron." The court held this evidence inadmissible. As reported in 10 Mo. App., the court said:

"The words 'more or less' in a written contract are never understood to permit more than a small departure from the quantity named in the contract. Such being the meaning affixed by law to the words 'more or less' in a written contract, the use of such words does not create such an ambiguity in the contract as will let in parol explanation. The words '400 tons more or less' are to be taken, not as mere words of expectation, but as words of contract limiting and defining the quantity to be sold. (*Morris v. Levison*, 1 C. P. Div. 155; *Leeming v. Snaith*, 16 Q. B. 275.) The construction put upon the contract by the defendant has the effect of erasing from the contract the words '400 tons.' This cannot be done. It is well settled, in interpreting any written instrument, that such a meaning shall be put upon it as will, if possible, give effect to all its parts."

In *Cabot v. Winsor*, 1 Allen (83 Mass.), 546, the contract was as follows: "Sold to Nath'l Winsor Jr. & Co. for account of Stephen Cabot, Esq., five hundred (500) bundles, more or less, gunny bags at 10c. per bag." It appeared in evidence that both parties knew that the object of the defendant in making the purchase was to fill the ship "Hesperus," then lying at India Wharf, and that at the time of the purchase it was uncertain what number of bundles would be needed for that purpose. Only 200 bundles were actually taken on board of the "Hesperus," that being all that proved to be necessary to fill the ship; the remainder, about 275 bundles, were left on the wharf. Defendants claimed that under the contract they were to have 500 bundles, or more or less than that number, as might reasonably be found necessary to fill the ship, or at their election; and that, as they did not require any more than the 200 bundles for that purpose, and as they in fact never received any more than that number, they were only bound to pay for 200.

But it was held at the trial that there was no latent ambiguity in the contract, and that its construction was for the court. Defendants offered to prove by parol that both par-

ties understood the contract differently, and that it was not intended to cover more than enough to fill the ship; and they offered to prove the declarations and acts of the plaintiff before, at the time of, and after the making of the contract, for the purpose of showing that he so construed it; but the judge excluded the evidence. On the appeal the supreme judicial court said:

"We are unable to perceive any ground on which it can be held that this contract falls within any of the exceptions to the familiar and well-established rule which excludes all parol evidence in the construction of the written agreements of parties. The language in which it is expressed is not technical, nor is it alleged to have any peculiar or local signification, or to have been used with reference to any custom or usage, which would vary or change its natural and ordinary meaning. Nor are the terms of the contract rendered uncertain or doubtful by reference to extrinsic facts, so as to create a latent ambiguity. The words 'more or less,' which seem to have given rise to the contention between the parties, have a plain, ordinary and popular signification, and are often used in contracts relating both to real and personal estate."

After speaking of the sales of merchandise, especially in large quantities, where these terms are frequently used in connection with the specific quantity named in the contract, the court said: "But in such cases, parol evidence is not admitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified; and the effect of the words 'more or less' is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowance for an excess or short delivery arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold." It was held that the readiness to deliver 475 bundles was sufficient compliance, and that "a variation of five per cent in so large a quantity was not such a deficiency as to fall outside of the fair and reasonable limit of short delivery."

In *Creighton v. Comstock*, 27 Ohio St. 548, the sale was of timber "supposed to be twenty-three thousand feet white pine timber, more or less, now laying in the river immediately under said Creighton's logway in the Ohio River at Columbus." A delivery of 16,000 feet was held to be insufficient and involved too great a variation or deficiency to be brought within the meaning of the term "more or less."

In *Holland v. Rea*, 48 Mich. 218, [12 N. W. 167], the court held that 473 M feet of lumber would not satisfy a call for 500 M feet "more or less." See, also, the rule stated in *Kirwan v. Van Camp Packing Co.*, 12 Ind. App. 1, [39 N. E. 536].

Respondent cites the case of *Day v. Cross*, 59 Tex. 595. In that case the sale was of all the cattle of certain brands, 10,000 head, more or less, except a certain number of the cattle of certain brands. The court held that it was not a guaranty as to the number of the cattle in said marks and brands, but a contract for the sale of the marks and brands, and that the seller was only bound to exercise good faith, care, skill and energy to collect the cattle, taking them from the range where they were accustomed to run at the making of the contract. Here the controlling feature was the marks and brands and not the designated number as indicating what was sold.

In *Tilden v. Rosenthal*, 41 Ill. 385, 89 Am. Dec. 388, by the written contract defendant agreed to deliver on a certain day "262 head, more or less, of good fat cattle . . . to average thirteen hundred pounds, and are the cattle known as the McCoy and Bishop lot, now being fed in the vicinity of Council Bluffs, Iowa." Plaintiffs tendered 178 head, which defendants refused to receive and plaintiffs brought suit for this number. The court held that the phrase "more or less" was used by the parties to cover such trifling deficiencies in number as might be caused by the ordinary casualties of death or loss. "But," said the court, "the deficiency was nearly one-third of the whole number contracted for. We are not prepared to say that when a person contracts for a lot of cattle containing 262 head he shall accept 178." See cases collected in Benjamin on Sales, section 682 et seq. For discussion of rule in sale of land see *Belknap v. Sealey*, 14 N. Y. (4 Kern.) 143, 67 Am. Dec. 120, and note; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 202.

Appellants make no point in their brief as to the 17 tons for which they allege that they agreed to pay the market value. The sole question discussed relates to the liability of defendants for the 166 tons of grapes which they refused to accept.

Our conclusion is that in accepting the 256.817 tons defendants became liable therefor at the contract price, but that they were not bound to accept the excess tendered by plaintiffs and refused by defendants.

The judgment and order are reversed.

Hart, J., and Burnett, J., concurred.

[Crim. No. 47. Third Appellate District.—May 16, 1907.]

EX PARTE HENRY HAASE, on Habeas Corpus.

HABEAS CORPUS—CONVICTION UPON PLEA OF GUILTY OF BURGLARY IN FIRST DEGREE—DETERMINATION OF DEGREE—JURISDICTION—PRESUMPTION.—Upon a petition for *habeas corpus* the attack upon a judgment of conviction in the superior court upon a plea of guilty of burglary in the first degree is collateral, and every intendment is in favor of the judgment. Though it seems that, in such case, no substantial right of the defendant would be invaded by failure of the court to determine the degree, yet the only question upon *habeas corpus* is as to the jurisdiction; and if it be supposed necessary that the court should determine the degree, it must be presumed, where the record does not affirmatively show the contrary, that the court determined the degree upon sufficient evidence notwithstanding the plea.

HEARING on writ of *habeas corpus* addressed to the warden of the state prison, holding petitioner under a judgment of conviction in the Superior Court of San Bernardino County. B. F. Bledsoe, Judge.

The facts are stated in the opinion of the court.

R. T. McKisick, for Petitioner.

U. S. Webb, Attorney General, for Respondent.

BURNETT, J.—Petitioner asks to be discharged from the custody of the warden of the state prison on the ground that the “judgment and sentence were and are void, that said court had no authority in law to enter said judgment or to pronounce said sentence; that the same are in excess of the jurisdiction of the court and are nullities.”

The return to the writ shows that petitioner is imprisoned by virtue of a commitment issued out of the superior court of the state of California in and for the county of San Bernardino in the following form: “The district attorney, with the defendant, who had heretofore waived counsel, came into court. The defendant was duly informed by the court of the nature of the information filed against him for the crime of burglary committed on the 6th day of October, 1904, of his arraignment and plea of guilty on the 8th day of October, 1904, of *burglary in the first degree*. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him. To which he replied he had none. And no sufficient cause being shown or appearing to the court, thereupon, the court rendered its judgment: That whereas, the said Henry Haase, having been duly convicted in this court of the crime of burglary in the first degree.

“It is therefore ordered, adjudged and decreed that the said Henry Haase be punished by imprisonment in the state prison of the State of California at Folsom for the term of eight years.”

It is insisted that the court had no jurisdiction to sentence the defendant because of its failure to determine the degree of the crime. In this connection petitioner cites section 1192 of the Penal Code, which provides: “Upon a plea of guilty of a crime distinguished or divided into degrees the court must, before passing sentence, determine the degree.” And in response to the suggestion that the defendant by the form of his plea obviated the necessity of the court’s actual determination of the degree, attention is directed to section 1017 of the same code, providing for the form of the plea as follows: “Every plea must be oral and entered upon the minutes of the court in substantially the following form: 1. If the defendant plead guilty, ‘the defendant pleads that he is guilty of the offense charged.’”

The usual and proper practice undoubtedly is to charge in general terms in the information the offense of burglary with-

out specifying the entry as having been made in the day or night time. If the defendant then pleads guilty, the plea should be, in orderly sequence, "Guilty of the offense charged," to wit, burglary. The duty would then be cast upon the court to determine the degree before passing sentence. And if the court failed to determine the degree it would be prejudicial error. (*People v. Jefferson*, 52 Cal. 452.) But what objection could be urged against an information charging burglary in the night-time? The effect would be simply to confine the plea or the trial to the crime of burglary in the first degree. (*People v. Smith*, 136 Cal. 208, [68 Pac. 702].) But if the defendant were arraigned upon such an information and should plead guilty of "burglary in the first degree," and were sentenced to eight years in the penitentiary, it could not be said that the judgment was void or even voidable. In such a case the plea would be equivalent to that "of guilty of the offense charged," and it would be a substantial compliance with the requirement of the statute.

When, as in the case at bar, the information charges burglary in general terms so as to include both degrees, why should the defendant be precluded from pleading in harmony with the facts guilty of either one of said offenses if he so desires? How is any substantial right of the defendant invaded if the court accepts his confession that the crime was committed in the night-time instead of calling a witness to prove such fact? Ordinarily, the court would determine the degree by the examination of witnesses, but it would seem to be entirely unnecessary where the defendant—presumably upon sufficient information as to the nature and consequences of the offense—confesses in effect that he committed the crime in the night-time and is therefore guilty of burglary in the first degree.

But aside from the foregoing consideration it is manifest from the record before us that petitioner is not entitled to his discharge. The only question, admittedly, that we can consider upon this application, is the jurisdiction of the court below to sentence the defendant. (*Forbes v. Hyde*, 31 Cal. 342; *Ex parte Hollis*, 59 Cal. 405; *In re Bouner*, 151 U. S. 242, [38 L. ed. 149].) Again, the proceeding of *habeas corpus* is not a substitute for appeal. (*Ex parte Long*, 114 Cal. 159, [45 Pac. 1057]; *Kellar v. Davis*, 69 Neb. 494,

[95 N. W. 1028].) And in reviewing the record of a court of general jurisdiction, it must be remembered that every indictment is in favor of the judgment, and that the want of jurisdiction must affirmatively appear. This is a collateral and not a direct attack, and in order to entitle petitioner to his discharge the record must show that the judgment is a nullity.

In *Re Eichhoff*, 101 Cal. 603, [36 Pac. 11], Mr. Justice Harrison, speaking for the court, said: "More than two hundred years ago it was said in *Peacock v. Bell*, 1 Wm. Saund. 74, that 'The rule for jurisdiction is that nothing shall be intended to be *out of the jurisdiction of a superior court* but that which specially appears to be so; and, on the contrary, nothing shall be intended to be *within the jurisdiction of an inferior court* but that which is so expressly alleged'; and this rule has been so frequently repeated as to have become a maxim in the law. This presumption extends to everything necessary for the support of the judgment, as well those facts which are necessary to give the court jurisdiction of the defendant as those which are necessary to sustain its decision of fact or conclusion of law thereon. . . . The fact that the court has rendered a judgment implies a determination by it before it assumed to hear the controversy, that it had jurisdiction over the subject matter of the action, and of the defendant against whom the complaint was directed. . . . Its determination upon this question is to be made upon evidence of some nature; . . . *and if its conclusion is incorrect, it is merely error, which can be reviewed only upon a direct appeal.* Even though it should determine the question *without any evidence* before it, the same presumption of verity attends its decision upon this point as upon any other issue which it may determine without evidence. Nor does this presumption of its jurisdiction to make the decision depend upon the existence of any record of the decision. . . . If it makes a record of the facts giving it jurisdiction, or of its exercise of such jurisdiction, there is no occasion to invoke any presumption. It is only when the record is silent that the necessity for presumption arises." It would seem impossible to add anything to the foregoing statement of the rule.

The doctrine is announced also in the late case of *Canadian etc. Co. v. Clarita etc. Co.*, 140 Cal. 674, [74 Pac. 301],

through Mr. Justice Angellotti, as follows: "Every presumption is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which will defeat the judgment. Unless the record of the judgment itself affirmatively shows that the court was without jurisdiction to render the judgment, the judgment is not void upon its face." (See, also, *In re Brown*, 32 Cal. 49.)

In the case at bar it is not required that the record shall show that the court heard evidence and determined the degree of the offense, even if we assume that under the peculiar circumstances such determination was necessary. "The only material parts of a judgment are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers and therefore not necessary to be repeated, and the sentence of the court. (*In re Ruiz*, 28 Cal. 253.) Hence, here, the commitment, which is merely a certified copy of the judgment, is properly silent as to whether the court formally determined the degree or whether any evidence on the subject was received. If necessary, however, to support the judgment, it must be presumed that notwithstanding the plea of guilty of burglary of the first degree, the court heard evidence and determined that the offense was committed in the night-time and was therefore burglary of the first degree. There is no ground for the contention of petitioner that it appears affirmatively that no such proceeding was had. The affidavit of the clerk verifying the minutes of the court was received in evidence at the hearing, but it simply discloses the fact that the record is silent as to whether the court determined the question as petitioner claims it should have done before passing sentence.

We have not referred to many of the decisions cited and suggestions made by counsel, as we deem the foregoing decisive of the issue.

The writ is discharged and the petitioner is remanded.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 816. Third Appellate District.—May 16, 1907.]

ALICE E. HINER, Respondent, v. J. F. HINER, Appellant.

ACTION FOR MAINTENANCE—EQUITY CASE—ORDER FOR ALLOWANCE PENDING SUIT—APPEAL—JURISDICTION OF SUPREME COURT—TRANSFER.—

One who has a cause of action for divorce may, without suing for a divorce, maintain a separate cause of action for maintenance, addressed to the equity jurisdiction of the superior court. An appeal from an order granting an allowance pending such action should be taken directly to the supreme court. When taken to this court, it cannot be dismissed, but must be transferred to the supreme court under section 4 of article VI of the constitution.

APPEAL from an order of the Superior Court of Sonoma County granting an allowance pending an action for maintenance. Emmett Seawell, Judge.

The facts are stated in the opinion of the court.

J. F. Thompson, for Appellant.

J. W. Oates, for Respondent.

CHIPMAN, P. J.—Plaintiff is the wife of defendant and brings the action for separate maintenance for herself and three children of the marriage. The complaint alleges that in October, 1902, plaintiff and defendant were residing together in the county of Chehalis, state of Washington, and that in said month defendant abandoned and willfully deserted plaintiff and has never returned to plaintiff or to their said residence, but still continues to abandon and desert plaintiff; that defendant came to California shortly after October, 1902, "and is now a *bona fide* resident of Sonoma County"; that "plaintiff ever since October, 1902, has been and is now a *bona fide* resident of said Chehalis County, State of Washington"; that defendant is possessed of considerable means, setting forth a description of property alleged to be owned by him, and that plaintiff, when so abandoned and deserted by defendant, was left with no means of income and with property "of but little value and plaintiff now has

no means of support." Plaintiff alleges that she is in need of \$100 per month from October, 1902, thenceforth "for her support and for the support of her said minor children"; that "under the laws of the State of Washington the plaintiff has a cause of action against defendant for a divorce." The prayer of the complaint is that it be decreed that plaintiff "has a cause for divorce against defendant; that \$100.00 per month is a proper amount for the support of plaintiff and her said minor children and has been ever since said desertion of plaintiff by defendant." Attorney's fees are also prayed for in the sum of \$250 and \$100 pending the trial of the action and for costs and expenses of suit, and "that the same may be made a charge upon said land and premises," and for such other relief as may be meet and proper.

Plaintiff gave notice to defendant that at a time stated she would move the court for an order requiring defendant to pay plaintiff \$100 per month, commencing at the filing of the complaint; also for \$400 attorney's fees and \$300 for costs and expenses; that said motion would be heard upon the pleadings and upon certain affidavits, copies of which were served with the notice. The matter came on to be heard upon said papers and upon counter-affidavits filed by defendant, and upon the hearing the court made an order that defendant forthwith pay \$210 as and for alimony; \$50 costs of suit and \$100 as attorney's fees and directed that execution issue to enforce collection of the same. The appeal is from this order and is taken directly to this court.

Section 137 of the Civil Code provides for the payment of alimony "where an action for divorce is pending." As amended in 1905, Statutes 1905, page 205, it also provides further: "When the wife has any cause of action for a divorce as provided in section ninety-two of this code, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children. During the pendency of such action the court may, in its discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for the support and maintenance, and execution may issue therefor in the discretion of the court. The final judgment in such action may be enforced by the court by such order or orders as in its dis-

cretion it may from time to time deem necessary, and such order or orders may be varied, altered or revoked at the discretion of the court."

It was held in *Sharon v. Sharon*, 67 Cal. 185, [7 Pac. 456, 8 Pac. 709], that divorce is an action in equity within the meaning of the constitution conferring appellate jurisdiction upon the supreme court; and in *Benton v. Benton*, 122 Cal. 395, [55 Pac. 152], it was held that in actions for divorce, with application for alimony or allowance for support *pendente lite*, the cause of action is divorce and the support of the wife pending suit is an incident. *Hardy v. Hardy*, 97 Cal. 125, [31 Pac. 906], was an action for maintenance, without applying for a divorce. The statute gave the action then "when the husband willfully deserts the wife." The court said: "Proof of willful desertion by the husband is therefore an essential element in the plaintiff's cause of action." As the statute now reads we should hold it to be an essential element of the plaintiff's cause of action that the wife should show "a cause of action for divorce as provided in section 92" of the Civil Code. To do this she must appeal to the equity side of the court, and hence it would seem to follow that the action for maintenance must be addressed to the equity powers of the court. If, however, this reasoning be doubtful, the language of the section removes all doubt. The judgment contemplated is a judgment confided to the discretion of the court, and may be enforced at its discretion by order or orders, and these orders may with like discretion be varied, altered or revoked. Clearly a jury trial could not be demanded to assess an amount which rests wholly within the discretion of the court, and which may, upon cause shown, be taken away by the court.

The supreme court is given appellate jurisdiction "in all cases of equity, except such as arise in justice's court." (Const., art. VI, sec. 4.) The appeal, in our opinion, should have been taken directly to the supreme court and not to this court. By the same section it is provided that where the appeal is not taken to the proper court it shall not be dismissed, "but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto."

It is therefore ordered that the cause be transferred to the supreme court, the costs to attend the final disposition thereof by that court.

Burnett, J., and Hart, J., concurred.

[Crim. No. 43. Third Appellate District.—May 18, 1907.]

Ex Parte ELMER FOWLER, on Habeas Corpus.

HABEAS CORPUS—CRIMINAL LAW—NEW INFORMATION—ERROR NOT REVIEWABLE.—Any error in the exercise of the jurisdiction of the superior court in allowing a new information to be filed, based upon a correction by the magistrate of his order of commitment, without a re-examination, after a first information has been set aside as not warranted by the commitment, or any irregularity in the action of the magistrate, affecting the substantial rights of the defendant, is not reviewable upon *habeas corpus*, and can furnish no ground for his discharge.

ID.—INFORMATION NOT BASED ON ORDER OF COMMITMENT—SETTING ASIDE.—An information upon a commitment which held the petitioner for an offense different from that charged in the information has no proper basis on which to rest. The district attorney was not authorized to file it, and it was properly set aside.

ID.—POWER OF SUPERIOR COURT—NEW INFORMATION—CORRECTION OF IRREGULARITY BY MAGISTRATE.—The superior court has power, upon setting aside an information because not charging the offense for which the prisoner has been committed, or because of any irregularity in the order of commitment, to order a new information to be filed, or to direct any irregularity in the order of commitment to be rectified by the magistrate, and a new information based thereon to be filed.

ID.—IRREGULARITY IN COMMITMENT—ASSAULT WITH INTENT TO MURDER—OMISSION OF WORDS—"MALICE AFORETHOUGHT."—Where it is clear that the magistrate intended to hold the defendant to answer for an assault with a deadly weapon with intent to commit murder, and the attempt was merely ineffectual for want of the technical words "with malice aforethought," necessary to the complete description of the crime, it appears that the omission amounts only to an irregularity, which it is within the power of the magistrate to correct, upon being ordered to do so by the superior court.

ID.—LAPSE OF THIRTY DAYS AFTER EXAMINATION—"GOOD CAUSE" FOR DELAY.—It seems that section 809 of the Penal Code requiring an information to be filed within thirty days after the order of commitment has no reference to a new information filed, upon a corrected order, after the original has been set aside; but if that section should be deemed applicable the conditions which gave rise to the necessity for the filing of the new information more than thirty days after the original order constitute "good cause" for the delay contemplated by section 1382 of the Penal Code.

ID.—RE-EXAMINATION NOT REQUIRED UPON CORRECTION OF COMMITMENT.—Where the magistrate is directed by the court to correct an irregularity in the order of commitment after an information has been set aside, it is unnecessary for the magistrate to go into a re-examination of the charge in order to make the correction which would justify a new information upon the original charge.

APPLICATION for writ of *habeas corpus* to the sheriff of Merced County, to review criminal proceedings in the Superior Court. E. N. Rector, Judge.

The facts are stated in the opinion of the court.

Ben Berry, and B. F. Fowler, for Petitioner.

U. S. Webb, Attorney General, for Respondent.

HART, J.—Petitioner, who is held under restraint by the sheriff of Merced county, under an information charging him with the crime of assault with a deadly weapon with intent to commit murder, makes this application for his release from the custody of said sheriff, on *habeas corpus*.

On January 20, 1907, a complaint or deposition was filed in the justice court of township No. 3 of Merced county, charging the petitioner with the crime of assault with a deadly weapon. Upon an examination of the charge on the thirty-first day of January, 1907, the magistrate made and entered an order, obviously attempting to commit the petitioner for trial in the superior court for the offense of assault with a deadly weapon with intent to commit murder. On the fourteenth day of February, 1907, the district attorney of Merced county filed in the superior court an information charging petitioner with the crime for which the magistrate thus attempted to order him committed. Upon appearing in court for arraignment under said information, on the fourth day

of March, 1907, petitioner made a motion to set the same aside on the ground that prior to the filing thereof he had not been legally committed for the offense charged therein. On the following day the court made an order granting petitioner's motion by setting aside said information, and made the further order "that the Clerk of said court return all the papers to the committing magistrate for recommitment."

The order made by the magistrate and entered in his docket, committing petitioner for trial, reads as follows: "Whereupon the case being submitted, it is by the court ordered that Elmer Fowler be held to answer to the Superior Court upon a charge of assault with a deadly weapon with intent to commit murder, committed as follows: That said Elmer Fowler on or about the 20th day of January, 1907, at Los Banos, in said County of Merced, State of California, willfully, unlawfully and feloniously did assault one James Cowan, a human being, with a deadly weapon, to wit: a loaded pistol with intent to commit murder."

On the eighth day of March, 1907, the magistrate made the following entry in his docket: "... Received March, the 8th, 1907, from County Clerk of order of Superior Court directing of return of papers for recommitment." Thereafter and on the 13th day of March, 1907, the following order was entered in his docket by the magistrate: "March 13th, 1907. People v. Elmer Fowler. Wherefore, the papers being returned for recommitment, it appearing to me that the offense of assault with intent to commit murder has been committed as follows: That on or about the 19th day of January, A. D. 1907, Elmer Fowler did unlawfully, willfully, feloniously and with malice aforethought assault one James Cowan in the town of Los Banos, Merced County, State of California, with a deadly weapon, to wit: a loaded pistol, with intent then and there to kill and murder said James Cowan, and there is sufficient cause to believe the within Elmer Fowler guilty thereof, I order that he be held to answer to the same," etc. The same order in substance and effect was thereupon indorsed by the magistrate on the complaint filed with him on the twentieth day of January, 1907. The new or amended commitment, with the other "papers," having been by the magistrate returned to the clerk of the superior court, a new information was, on the twenty-first day of

March, 1907, filed in said court by the district attorney, charging petitioner with the crime of an assault with a deadly weapon with intent to commit murder. On the thirtieth day of March, 1907, upon his appearance for arraignment upon the charge alleged in said information, petitioner "moved said Superior Court to set aside the information upon the ground that prior to the filing thereof, he had not been legally committed for the offense charged in said information and upon the further ground that on the 13th day of March, 1907, the committing magistrate was without jurisdiction to make and enter the judgment and order holding the petitioner to answer before the Superior Court for trial for the offense therein indicated; that the indorsement of said judgment and order upon the complaint by the committing magistrate was void and the information based upon such indorsement was void." The court denied the motion. Upon the same day, and after the court refused to grant petitioner's motion to set aside the information, a motion was made by petitioner "to dismiss the prosecution of said charge upon the ground that the information had not been filed within thirty days from the time the preliminary examination was held and petitioner held to answer before the Superior Court of said County of Merced on the 31st day of January, 1907." This motion was denied by the court.

The petitioner thus presents two points or grounds upon which he claims to be entitled to his release: 1. "That the committing magistrate was without jurisdiction to make and enter his judgment and order on the 13th day of March, 1907, and hence the commitment based thereon is void." 2. That the said information was not filed in the superior court within thirty days after the petitioner had been examined and committed, as required by section 809 of the Penal Code.

It will be observed that the defect in the original commitment consisted in the failure of the magistrate to properly designate or describe the offense for which it was his evident intention to commit the petitioner. The complaint or deposition charged an assault with a deadly weapon, and the other depositions or testimony presumably developed, in the judgment of the magistrate, a case of assault with a deadly weapon with intent to commit murder. The magistrate entered an order in his docket, attempting to commit petitioner

for the last-mentioned assault, but omitted, in his description thereof, the words "with malice aforethought," which are indispensably essential to the description or charging of that offense. The district attorney, in the information based upon that order of commitment, charged the petitioner with the crime of an assault with a deadly weapon with intent to commit murder. The superior court, upon motion, set aside the information because it appeared that the petitioner had not been legally committed for the offense charged in said information, and ordered the clerk of said court to "return all the papers to the committing magistrate for recommitment." The course pursued by the court thus far was regular, if the order of commitment involved only an irregularity. The information, based upon a commitment which held petitioner for an offense different from that charged in such information, had no proper basis on which to rest, and the district attorney was not authorized to file it. (*People v. Thompson*, 84 Cal. 601, [24 Pac. 384]; Pen. Code, *secs.* 872, 997, 998.)

But it is contended that a new information should have been based upon the original order and in conformity thereto; that the court, having once made the order committing the petitioner for assault with a deadly weapon, which said order was entered in his docket, lost all further jurisdiction of the case, and could do nothing further with reference thereto than to correct some irregularity, if any existed, in such order of commitment; that the proceeding had by him with regard to the "papers returned for recommitment" involved not simply the correction of an irregularity or defect in the order of commitment, but constituted the making of an entirely new order, committing petitioner for an entirely different and distinct offense from that for which he was originally held. We are of opinion that this point presents a question which cannot be reviewed in this proceeding. (*Ex parte Nicholas on Habeas Corpus*, 91 Cal. 641, [28 Pac. 47].) The so-called new information charged the petitioner with an offense of which the superior court has jurisdiction, and it gave the court jurisdiction of the person of the petitioner, and the court therefore had jurisdiction, upon the motion to set aside the information, to hear and determine "whatever questions of law or fact were involved in the motion, and its decision, although it may be erroneous, is not void.

On the contrary, it is valid and binding until reversed on appeal." (*Ex parte Nicholas*, 91 Cal. 641, [28 Pac. 47]; *Ex parte Walpole*, 85 Cal. 362, [24 Pac. 657].) If there was any irregularity in the order of commitment by the magistrate affecting the substantial rights of petitioner, it was subject to review, first in the superior court, upon motion to set aside the information based upon such order of commitment, and then by this or the supreme court upon appeal; but it is not a ground for discharging the prisoner on *habeas corpus*. (*Ex parte Walpole*, 85 Cal. 362, [24 Pac. 657].) It is elementary that when a court has jurisdiction of the subject matter of the litigation and of the persons of the parties litigant, it has jurisdiction to make errors as well as to not make them. This is, of course, only putting in another form the rule that such errors are not reviewable in an extraordinary proceeding, or in a proceeding the sole purpose of which is to try the question of jurisdiction. In other words, jurisdiction is "the power to hear and determine," and when a court has once determined a proposition within its jurisdiction, such determination, whether right or wrong, is at an end and is conclusive until challenged, through some motion or in some other proper legal proceeding. It may, however, be suggested (though it need not be here decided) that it at least seems clear that the magistrate attempted to make an order committing the petitioner for the very offense for which he finally ordered him to be committed, and that the attempt was ineffectual only because of the omission in the order of certain technical words necessary to the description of the crime. It would at least appear to harmonize with common sense to hold that where the language of the order is such as to lead to no other rational conclusion than that the magistrate intended to commit the prisoner for a certain offense, but fails to do so merely because he has not described the same in the order of commitment with the technical nicety and precision which is required in stating the offense in an indictment or information, it amounts only to an irregularity which it is within the power and authority of the magistrate to correct upon being directed to do so by the superior court. We find nothing in any language used in *Ex parte Branigan*, 19 Cal. 133 et seq., in conflict with this suggestion. Of course, we are not to be understood as suggesting that a magistrate, after once committing an accused for a certain offense, may thereafter

change his order and commit him for another and distinct offense. Nor is there anything involved in our suggestions upon this point to be construed as a disapproval of the opinion in the case of *People v. Nogiri*, 142 Cal. 597, [76 Pac. 490]. On the contrary, we think that that case with great clearness straightened out certain propositions which had theretofore been misconceived and misunderstood, and expounded them in accordance with the real intention of the lawmakers. The opinion in that case is not, however, in point here, if the suggestion we have made that the omission in the order of commitment was but a mere irregularity be sound. If the suggestion is erroneous, then the *Nogiri* case would no doubt be an authority upon appeal, if the case ever reaches that point.

The second point urged is, we think, without substantial merit. The proposition involved in this point is whether or not there was failure on the part of the district attorney, in the matter of the filing of the information, to comply with the mandate of section 809 of the Penal Code. That section requires that an information shall be filed within thirty days after the examination and the order committing a defendant for trial in the superior court. It has been held that this provision is mandatory, and that default by the district attorney in filing an information within the time limit prescribed therein, unless good cause therefor be shown, forfeits his right as such officer to do so at all upon the commitment returned by the magistrate, and that the superior court cannot, under an information filed after such time, acquire jurisdiction to try the prisoner for the offense therein charged. (*In re Begerow*, 133 Cal. 349, [85 Am. St. Rep. 178, 65 Pac. 828].) At least, the court held in that case that subdivision 2 of section 1382 of the Penal Code, which provides that the prosecution against a defendant must be dismissed, the trial not having been postponed upon the application of defendant, unless good cause be shown therefor, if the defendant is not brought to trial within sixty days after the finding of the indictment, or filing of the information, is imperative and mandatory. We can see no reason why the same may not be said of subdivision 1 of that section, prescribing the time limit of thirty days within which the information must be filed. The only question here, then, is, Was the filing of the new or second information by the district attorney more than thirty days after the date of the making of the original order,

or, perhaps more correctly speaking, the attempted order committing the petitioner for the crime of assault to commit murder, an idle and nugatory and void act and the information thus filed insufficient to confer upon the superior court jurisdiction to try said petitioner thereunder? The power of the court, upon setting aside an information for the reason that it does not charge the offense for which the prisoner has been committed, or because of any irregularity in the order of commitment, to order a new information to be filed, or directing any irregularity in the order of commitment to be rectified by the magistrate, and a new information based thereon filed, is unquestioned and conceded. (Pen. Code, secs. 997, 998; *People v. Thompson*, 84 Cal. 601, [24 Pac. 384]; *Ex parte Walpole*, 85 Cal. 362, [24 Pac. 657]; *People v. Lane*, 101 Cal. 515, [36 Pac. 16].) If section 809 of the Penal Code could be held to be applicable to a case where an information has been dismissed or set aside and a new one directed by the court to be filed in its place, and such new information is filed more than thirty days after the time at which the order of commitment was made, we are of the opinion that the conditions which gave rise to the necessity for the filing of the new information after the thirty days after the original order of commitment has been made constitute the "good cause" contemplated by section 1382, *supra*, as an excuse for a failure to file the information within the time prescribed by said section 809, *supra*. But it seems to us that the supreme court has settled this question in a number of cases. In the case of *People v. Lee Look*, 143 Cal. 221, [76 Pac. 1029], the court, speaking through Mr. Justice McFarland, says: "There is nothing in the point that the second information was not filed within thirty days after appellant was held to answer. The provision of section 809 of the Penal Code has no reference to the new information which may be directed by the court after a demurrer sustained to the information." There can be no distinction upon principle between the case of a demurrer sustained to an information and where the information has, upon motion, been set aside.

In the case of *Begerow*, (133 Cal. 349, [85 Am. St. Rep. 178, 65 Pac. 828]), the court, among other things, said: ". . . And, indeed, a mistrial is not a trial, within the meaning of the constitution or statutory provision. *The fact*

that there has been an attempted trial may constitute the good cause which the prosecution is required to show to excuse delay. . . .” (Italics ours.) So, as we have suggested, the fact that the district attorney has attempted to file an information within the thirty days and has failed, should be, we think, sufficient cause to excuse the delay which, but for the order of the superior court setting aside the information—an order which the law commanded should be made—would not have occurred.

In the cases of *People v. Thompson*, 84 Cal. 601, [24 Pac. 657], and *People v. Lane*, 101 Cal. 515, [36 Pac. 16], and, in short, in every case where the point has been presented to and noticed by the court, it is declared that there is no necessity, after an order setting aside an information, upon the ground of irregularity in the order of commitment, to go into another examination of the charge in order to justify the filing of a new information. It would certainly entail upon both the people and the defendant great inconvenience and expense if a re-examination of the charge were necessary where an information had been set aside or dismissed because of some irregularity in the order of commitment or by reason of a failure of the district attorney to keep within the terms of the order of commitment in drafting and filing the information. The legislature could have had no such intention, and surely there can be found no reason for justifying the courts in giving the law a construction which would produce a result so unnecessary. But such a construction would inevitably be required if the true rule is, as contended by petitioner, that a second information, directed to be filed in the place of one filed within the time but set aside, must be filed within thirty days after the order of commitment is made.

For the foregoing reasons the writ will be discharged and petitioner remanded.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 301. Third Appellate District.—May 20, 1907.]

HEALDSBURG ELECTRIC LIGHT & POWER COMPANY, Appellant, v. CITY OF HEALDSBURG, Respondent.

ACTION AGAINST MUNICIPAL CORPORATION—TORTS ULTRA VIRES—INJURIES TO PROPERTY—INSUFFICIENT COMPLAINT.—A complaint in an action against a municipal corporation, setting forth acts of tort on the part of the defendant, willfully and wantonly causing injury to plaintiff's property, and preventing the plaintiff from continuing its lawful business, to the plaintiff's damage alleged, states acts of tort *ultra vires* to the municipal corporation, for which it cannot be held responsible, and states no cause of action against it.

APPEAL from a judgment of the Superior Court of Sonoma County. A. G. Burnett, Judge.

The facts are stated in the opinion of the court.

Wright & Lukens, for Appellant.

J. A. Barham, for Respondent.

CHIPMAN, P. J.—Action for damages alleged to have been caused by the oppressive, malicious and violent acts of defendant resulting in the destruction of parts of plaintiff's plant and with intent to compel it to discontinue business. A general and special demurrer was sustained, and plaintiff failing to amend, judgment passed for defendant, from which plaintiff appeals.

It is alleged in the amended complaint: That plaintiff is a corporation formed under the laws of this state for the purpose of supplying electric light and power to the residents of the city of Healdsburg, and that plaintiff ever since March 15, 1899, has been and on that day was lawfully so engaged; the complaint then describes the property and apparatus constituting plaintiff's plant; avers, in paragraph 7, that the said plant was not injurious to health or offensive to the senses, or in anywise interfered with the comfortable enjoyment of life or with the free use and passage of the public parks and streets of said city, and in no manner constituted a nuisance,

public or private; that on February 6, 1899, defendant, "well knowing the premises, but solely with the design and intent to oppress this plaintiff, and to compel it to discontinue its business aforesaid, duly passed an ordinance designated 'Ordinance No. 81' in the words and figures as follows"; then follows the ordinance which purports to describe the kind and character of the material to be used in the construction, maintenance and repair of electric lighting plants, or systems now in use in the city of Healdsburg, or to be hereafter erected therein. The amended complaint next charges that with like intent the said city on the same day duly passed ordinance No. 82, which declared certain described electric poles and wires to be a nuisance. It is next alleged that with like intent defendant, on March 10, 1899, served written notice upon plaintiff directing it "within four days from the hour of 7 o'clock of the forenoon of the eleventh day of March, 1899," to abate and remove all its unpainted electric poles now standing, etc., and all wires conducting electricity not properly insulated; defendant was further directed to comply with the provisions of said ordinances Nos. 81 and 82, copies of which were attached to said notice. It is then alleged that on March 14, 1899, all the trustees of defendant met and with like design and intent to oppress plaintiff and compel it to discontinue its business, passed a resolution, which is set forth in full, and which in substance recited the notice given plaintiff of March 10th; that the time in which plaintiff should comply therewith would expire at 7 o'clock A. M. of March 15, 1899; that said plaintiff has not abated or removed said nuisances, etc.; therefore, resolved "that the street commissioner . . . be, and he is hereby instructed, to abate and remove said nuisances, commencing at 7 o'clock A. M., March 15, 1899, and that he employ sufficient assistance to accomplish that purpose." It is then averred that, "Thereupon said defendant, . . . on the 15th day of March, A. D. 1899, wantonly and willfully intending and devising to oppress this plaintiff, and to compel it to discontinue entirely its business at the City of Healdsburg, forcibly and violently cut, uprooted, threw down, broke and so injured divers parts of the plant and property of the plaintiff as to prevent the plaintiff entirely from continuing its business aforesaid at Healdsburg"; that "by reason of said acts" the plaintiff was obliged to wholly discontinue its business to its damage in the sum

of \$20,000. There is no allegation in the complaint that plaintiff ever had, or now has, the right to erect poles or wires in said city. The defendant demurred for insufficiency of facts and also specially on the grounds of uncertainty, ambiguity and unintelligibility.

In its brief appellant makes the following statement: "The plaintiff was engaged in a lawful business at Healdsburg, mainly producing and supplying the City of Healdsburg and its residents with electric light and power. The business was not in itself a nuisance and could only become so in the manner of conducting it. But for the purposes of this demurrer the allegations of paragraph VII of the complaint are conclusive upon the defendant, and the only refuge remaining for the defendant is to plead that the acts complained of are *ultra vires* the municipal corporation. This in fact is what counsel for the defendant did in the court below, and it is for the correction of the error in so holding that this appeal is prosecuted." Appellant limits the discussion to the single question: Is a municipal corporation liable for the torts of its agents and servants whose acts are concededly *ultra vires*? We shall confine ourselves to this single question and we shall also assume, as conceded, that the acts complained of were *ultra vires*. We take it when counsel use this phrase it is with knowledge of its import, i. e., that it denotes, in the present case, an act or acts of tort done on behalf of the corporation, not within the scope of the powers conferred upon it. It is charged that defendant wantonly, willfully and with intent to oppress plaintiff and to compel plaintiff to abandon its business "forcibly and violently cut, uprooted, threw down, broke and so injured divers parts of the plant and property of the plaintiff as to prevent the plaintiff entirely from continuing its business aforesaid." It does not appear by direct averment whether this was pursuant to said ordinances and orders set forth; nor does it appear that the alleged injuries were done by the street commissioner pursuant to the order of the defendant; on the contrary, it appears that the defendant itself did the alleged mischief without averring other agency through whom it was accomplished. We are unable to discover any lawful authority for the destruction of plaintiff's property in the manner alleged. That it was *ultra vires* in the strictest sense of that phrase seems clear.

Whatever may be the doctrine in other jurisdictions, it is settled law in this state that a municipality cannot be held liable for injuries to private property thus perpetrated. The principle was applied in *Wichman v. City of Placerville*, 147 Cal. 162, [81 Pac. 537], in a matter of contract obligation, where it was held that the *ultra vires* acts of a municipal corporation are absolutely void; and we believe there is no distinction in the application of the principle between such acts arising out of contract and in tort.

In *Sievers v. San Francisco*, 115 Cal. 648, [56 Am. St. Rep. 153, 47 Pac. 687], the doctrine of *respondeat superior* was quite fully discussed, where the injury complained of was to private property, resulting from certain street grading. The court there said: "In the performance of its governmental or public functions, the corporation is either deemed a public agency, a mandatary of the state, as in *Barnett v. Contra Costa County*, 67 Cal. 77, [7 Pac. 177], and, therefore, not liable to be sued civilly for damages, or it is considered, in the performance of these functions, to be clothed with sovereignty, and therefore not liable in an action. (*Lloyd v. Mayor of New York*, 5 N. Y. 369, [55 Am. Dec. 347].) Where the injury results from the wrongful act or omission of an officer charged with a duty prescribed or limited by law, the officer is not treated as the servant or agent of the corporation in the performance of the duties enjoined, but is held to be the servant and agent of, and controlled by, the law, and for his acts the municipality will not be held liable." This case was referred to in *Ukiah v. Ukiah Water & Imp. Co.*, 142 Cal. 173, [100 Am. St. Rep. 107, 75 Pac. 773], where it is stated to be the established rule in this state that a municipality is not liable for damages occasioned by the negligence of its officials or employees; citing, also, *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Chope v. City of Eureka*, 78 Cal. 588, [12 Am. St. Rep. 113, 21 Pac. 364]. In *Chope v. City of Eureka*, it was held that in the absence of a statutory provision imposing the liability, a municipal corporation is not liable for personal injuries to individuals occasioned through the neglect of the officers of the corporation to properly perform their duties.

Mr. Dillon says: "If the act complained of lies wholly outside of the general or special powers of the corporation as

conferred in its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act or whether it be done by its officers without its express command." (2 Dillon on Municipal Corporations, sec. 968. See *Winbigler v. City of Los Angeles*, 45 Cal. 36; also extended note in *Goddard v. Inhabitants of Harpswell*, 84 Me. 499, [30 Am. St. Rep. 373, 376, 24 Atl. 958].)

Plaintiff seems to have been careful to show that the acts complained of were outside of any general or special powers given defendant, and to frame its pleading upon the theory, contended for now, that though *ultra vires*, defendant was liable for its alleged acts. We think plaintiff has misconceived the law as applied in this state.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 317. Third Appellate District.—May 21, 1907.]

PUTNAM VISHER, Administrator of Estate of SEBASTIAN VISHER. Deceased, Appellant, v. I. R. WILBUR, Respondent.

STATUTE OF LIMITATIONS—ACCOUNT STATED—UNPAID INTEREST ON BARRED NOTE PAID AND SURRENDERED.—Where at the time of stating an account purporting to be for unpaid interest on a note which was barred by the statute of limitations, and which had been fully paid and surrendered more than six years prior to such account stated, the cause of action for such interest is barred by section 337 of the Code of Civil Procedure.

ID.—EFFECT OF ACCOUNT STATED—OPERATION OF STATUTE.—As soon as an account ceases to be open and the balance is ascertained and assented to, it becomes a stated account, and the balance is at once subject to the operation of the statute.

ID.—EVIDENCE UPON ACCOUNT STATED—BAR OF STATUTE.—Upon the theory that the action was for money had and received upon an account stated, any evidence relevantly bearing upon the alleged bar of the statute pleaded in the answer was admissible to show that the account stated was for interest on a barred note.

ID.—TRUST THEORY OF COMPLAINT—VARIANCE—PROOF OF RELATION OF DEBTOR AND CREDITOR.—A trust theory of the plaintiff as to the

money evidenced by the promissory note is at variance with evidence showing simply and only the relation of debtor and creditor between the parties, and that the particular transaction from which the alleged indebtedness arose was in no manner impressed with the qualities of a trust.

ID.—ACKNOWLEDGMENT OF DEBT—NEW PROMISE—LETTERS WRITTEN TO HEIR—SUBSEQUENT APPOINTMENT AS ADMINISTRATOR.—Assuming that letters written by the supposed debtor to a single heir of the creditor, who at the time was not a representative of the estate, or authorized to bind it, contained language which, if written to the creditor or his personal representative, would constitute a sufficient acknowledgment to take the debt out of the operation of the statute, they could not have that effect, there being no privity of contract between the debtor and the heir; and the subsequent appointment of the heir as administrator could not have the effect to revive the right of action because of such prior letters.

ID.—REVIVAL OF BARRED CLAIM—WRITING ESSENTIAL—EXPRESS OR IMPLIED PROMISE—UNEQUIVOCAL ACKNOWLEDGMENT OF DEBT.—In order to revive a claim which is barred by statute, a writing is essential, and it must contain either an express or implied promise to pay an existing debt. In the absence of an express promise, the acknowledgment must be unequivocal, and must contain a direct and unqualified admission of an existing debt for which the party is liable, and which he is willing to pay.

ID.—INSUFFICIENT ACKNOWLEDGMENT—VAGUE AND CONDITIONAL DECLARATION.—A vague, indeterminate and conditional declaration in a letter that if the estate has any valid claim against the writer he will pay it if he ever gets money enough to do so does not constitute an acknowledgment from which even a conditional promise to pay the specific debt declared upon can be implied.

ID.—PLEADING—EVIDENCE—VARIANCE IN PROMISE.—Where one new promise is set forth in the complaint, the plaintiff cannot recover upon proof of another.

ID.—CLAIM AGAINST ESTATE—CREDIT OF ACCOUNT SUED UPON—SUBSISTING DEBT NEGATED.—A claim presented by the defendant against the estate, allowing a credit for the account sued upon, and showing a balance due from the estate to the defendant, does not show an acknowledgment of any subsisting debt as to such account, but expressly negatives such inference.

ID.—FINDING UPON BAR OF STATUTE—RULING UPON EVIDENCE WITHOUT PREJUDICE.—Where a finding that the cause of action was barred by the statute of limitations is supported by the evidence, any rulings upon evidence which was offered and received on the merits of the case, having no relation to the plea of the statute, whether erroneous or not, were without prejudice.

APPEAL from a judgment of the Superior Court of San Joaquin County. W. B. Nutter, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

S. D. Woods, for Respondent.

HART, J.—The complaint in this action alleges: “. . . That on or about the 1st day of January, 1894, one Sebastian Visher deposited and left with the defendant, I. R. Wilbur, the sum of \$1,722.77, lawful money of the United States, upon the express agreement and condition that the same should be held by the said I. R. Wilbur in trust for the said Sebastian Visher, and should draw interest from the time of such deposit to the time of payment at the rate of seven per cent per annum, and that the same should be paid to the said Sebastian Visher upon his demand therefor.” Following this allegation is an averment that on the first day of April, 1896, the defendant rendered to the deceased an itemized statement, showing the original balance due from said defendant to said Sebastian to be the sum of \$1,993.95, and also showing various items of expenditure made by defendant for and on account of said intestate of plaintiff, aggregating the sum of \$1,309.60, leaving, at the time of the rendering of said statement, the sum of \$684.35 still due and unpaid. It is this last-mentioned sum which the plaintiff in his complaint alleges to be the money held by defendant in trust for the benefit and use of his intestate during the lifetime of the latter. By the complaint we are informed that Sebastian Visher died intestate on the fifteenth day of November, 1898, in San Joaquin county, and that on the twenty-eighth day of December, 1903, the plaintiff, having previously made due application therefor, was granted, by the superior court of San Joaquin county, letters of administration upon the estate of said deceased. It is alleged that, after his appointment as such administrator, the plaintiff made demand upon the defendant for payment to and settlement with him, as such representative of the estate of the deceased, of the amount shown to be the balance due said estate by the statement rendered to deceased in his lifetime by said defendant.

The answer denies that the defendant is or was indebted to the deceased at the time of his death or at any other time, or to the estate of said deceased, in the sum mentioned in the complaint, or in any other amount. It is alleged that the defendant, prior to the death of said Sebastian Visser, paid to the latter all moneys due said Visser from defendant. There are other allegations in the answer directly declaring that certain specified sums of money were expended by the defendant for and on behalf of the deceased previous to his death, at the latter's request, and that, in addition to such expenditures, the defendant permitted the deceased, during his life, and for a long time prior to his death, to collect and appropriate to his own use the rents of a certain house in the city of Stockton, of which defendant was the owner, the total sum of said rents so collected by deceased being \$465.00; that it was at all times understood between them that the rents so collected "should be applied in payment on account, or in full, as the case might be, of any moneys on any account whatever due from the said defendant to the said Sebastian Visser." The answer also pleads the statute of limitations, in "that said action is barred by the provisions of section 337 of the Code of Civil Procedure."

The defendant had judgment, from which, upon a bill of exceptions, plaintiff presents this appeal.

The evidence taken consisted mainly of the testimony given by the defendant. The court found that "it is not true that on or about the 1st day of January, 1894, Sebastian Visser deposited and left with the defendant the sum of \$1,722.77 . . . or any other sum upon any agreement or condition that the same should be held by the defendant in trust for said Sebastian Visser; that it is not true that on or about the first day of April, 1896, or at any other time, the said defendant made or gave to said Sebastian Visser a statement in writing of the amount of moneys held by him in trust for said Sebastian Visser as set forth and alleged in said complaint or otherwise." The third finding of the court is as follows: "It is true that on or about the first day of April, 1896, the said defendant made and gave to Sebastian Visser the written statement of account in the words and figures as set forth in said complaint, and that said written statement of account was made and given by the said defendant to said Sebastian Visser as the written statement of account of the

or, perhaps more correctly speaking, the attempted order committing the petitioner for the crime of assault to commit murder, an idle and nugatory and void act and the information thus filed insufficient to confer upon the superior court jurisdiction to try said petitioner thereunder? The power of the court, upon setting aside an information for the reason that it does not charge the offense for which the prisoner has been committed, or because of any irregularity in the order of commitment, to order a new information to be filed, or directing any irregularity in the order of commitment to be rectified by the magistrate, and a new information based thereon filed, is unquestioned and conceded. (Pen. Code, secs. 997, 998; *People v. Thompson*, 84 Cal. 601, [24 Pac. 384]; *Ex parte Walpole*, 85 Cal. 362, [24 Pac. 657]; *People v. Lane*, 101 Cal. 515, [36 Pac. 16].) If section 809 of the Penal Code could be held to be applicable to a case where an information has been dismissed or set aside and a new one directed by the court to be filed in its place, and such new information is filed more than thirty days after the time at which the order of commitment was made, we are of the opinion that the conditions which gave rise to the necessity for the filing of the new information after the thirty days after the original order of commitment has been made constitute the "good cause" contemplated by section 1382, *supra*, as an excuse for a failure to file the information within the time prescribed by said section 809, *supra*. But it seems to us that the supreme court has settled this question in a number of cases. In the case of *People v. Lee Look*, 143 Cal. 221, [76 Pac. 1029], the court, speaking through Mr. Justice McFarland, says: "There is nothing in the point that the second information was not filed within thirty days after appellant was held to answer. The provision of section 809 of the Penal Code has no reference to the new information which may be directed by the court after a demurrer sustained to the information." There can be no distinction upon principle between the case of a demurrer sustained to an information and where the information has, upon motion, been set aside.

In the case of *Begerow*, (133 Cal. 349, [85 Am. St. Rep. 178, 65 Pac. 828]), the court, among other things, said: "... And, indeed, a mistrial is not a trial, within the meaning of the constitution or statutory provision. *The fact*

that there has been an attempted trial may constitute the good cause which the prosecution is required to show to excuse delay. . . . " (Italics ours.) So, as we have suggested, the fact that the district attorney has attempted to file an information within the thirty days and has failed, should be, we think, sufficient cause to excuse the delay which, but for the order of the superior court setting aside the information—an order which the law commanded should be made—would not have occurred.

In the cases of *People v. Thompson*, 84 Cal. 601, [24 Pac. 657], and *People v. Lane*, 101 Cal. 515, [36 Pac. 16], and, in short, in every case where the point has been presented to and noticed by the court, it is declared that there is no necessity, after an order setting aside an information, upon the ground of irregularity in the order of commitment, to go into another examination of the charge in order to justify the filing of a new information. It would certainly entail upon both the people and the defendant great inconvenience and expense if a re-examination of the charge were necessary where an information had been set aside or dismissed because of some irregularity in the order of commitment or by reason of a failure of the district attorney to keep within the terms of the order of commitment in drafting and filing the information. The legislature could have had no such intention, and surely there can be found no reason for justifying the courts in giving the law a construction which would produce a result so unnecessary. But such a construction would inevitably be required if the true rule is, as contended by petitioner, that a second information, directed to be filed in the place of one filed within the time but set aside, must be filed within thirty days after the order of commitment is made.

For the foregoing reasons the writ will be discharged and petitioner remanded.

Chipman, P. J., and Burnett, J., concurred.

prayer of the complaint, while, of course, not the test for the determination of the appropriate relief demanded by the allegations of the complaint, in effect asks for a judgment for money had and received on account stated. The evidence, the court finds, shows that the transaction involving the execution of the promissory note by the defendant to the deceased was closed on the 9th of August, 1890, on which day the defendant paid to Visher the sum of \$7,475, and received from the latter the note and a receipt acknowledging payment "in full of all demands to date." The defendant testified that, about two years after the circumstance of the payment by him to Visher of the sum of \$7,475.00, the latter visited him at his office in San Francisco, and declared that he had spent all his money and was therefore without means; that he was apprehensive that he would not leave, upon his death, sufficient means with which to defray his funeral expenses, etc. The defendant thereupon assured Visher that he (defendant) would attend to the matter of funeral expenses, and that he (Visher) would never want for the necessities of life while he lived so long as defendant had means. The latter then said to Visher that there was still due him (Visher) from defendant on the note surrendered on the 9th of August, 1890, by Visher to defendant, interest amounting approximately to the sum of \$1,700, and that he (defendant) would pay such interest, and render to him (Visher) a written statement to that effect. Visher insisted that defendant owed him nothing, and declared that defendant had already done too much for him. The deceased said, however, that if the defendant would send him a statement, pretending to show sufficient money due him from defendant to meet his funeral expenses, he might, by being able to exhibit such statement, receive better treatment at home. Thereafter, and in pursuance of that understanding, the defendant prepared and sent the deceased the written statement set out in the complaint.

It is thus apparent that, whatever might have been the reason or motive of defendant in sending to deceased the statement in question, the document constituted, if anything, an adjustment of the accounts between the parties. And, "as soon as an account ceases to be open, and the balance is ascertained and assented to, it becomes a stated account, and the balance is at once subject to the operation of the statute;

and an account becomes a stated account when it is furnished to another and he retains it for a long time without objection, as well as where the parties mutually agree upon a balance." (Wood on Limitations, 3d ed., sec. 280; Angell on Limitations, sec. 150; *Auzerais v. Naglee*, 74 Cal. 68, [15 Pac. 371].)

But counsel for appellant, evidently persuaded that the trust theory of his complaint is utterly untenable under the evidence adduced, contends that several letters written by the defendant and a claim filed by him against the estate of the deceased, which were received in evidence, amount to such an acknowledgment in writing of the proscribed liability as to warrant the implication of a new promise, and thus the right of action thereon has been revived. These letters were, with one exception, written prior to the appointment of plaintiff as administrator of the estate of the deceased, and all of them, with the exception of one, which was written to plaintiff's wife, were addressed to the plaintiff. Assuming that those written prior to appellant's appointment as administrator contain language which would constitute, if written to the creditor or his agent duly authorized to act for him with reference to the particular matter, a sufficient acknowledgment to take the debt out of the operation of the statute, we cannot see how such letters, having been addressed to persons between whom and the defendant there was no privity of contract, could in any view have the effect of reviving the right of action upon the indebtedness pleaded and to which it is claimed they refer. The plaintiff, at the time of the receipt of the letters, while interested as an heir in whatever estate the deceased might have left, was not an agent or representative of or otherwise duly authorized to act for and in behalf of the estate. The test would be, it seems to us, was the party to whom the acknowledgment, if any, was made legally competent to make a contract with respect to the subject as to which the statute had run? Could the plaintiff, before appointment as administrator, have legally negotiated and consummated a binding contract in behalf of the estate? "Under the modern rule," says Wood on Limitations, third edition, section 79, "that an acknowledgment or promise must be such as fairly raises an implied promise to pay the debt, it follows as a matter of course that the acknowledgment or promise must not only be made by a person legally competent

to contract, but must also be made to the creditor himself, or some person duly authorized to act for him in that regard, so that a new contract, resting upon the old one for its consideration, may be set up in reply to the statute, if it is pleaded by the defendant; and if it is made to an agent of the creditor, in order to make it operative, it must appear that the debtor at the time knew that the person to whom the acknowledgment or promise was made was acting as the agent of the creditor." (See, also, *Farrell v. Palmer*, 36 Cal. 189, and *Biddel v. Brizzolara*, 64 Cal. 354, [30 Pac. 609].)

But even if these letters, so addressed to plaintiff before he became vested with any legal power over the estate and its affairs, could properly be construed to have been addressed to one having the authority to contract for the estate (and it seems that upon principle they cannot be so construed), it is clear that their language cannot be construed either into an express promise to pay, or an acknowledgment from which a promise to pay the old debt can be implied by the law. There is nothing in the language of the letters which indicates that they refer to the particular claim upon which plaintiff declares with that clearness, directness and distinctness made requisite in such a case by the law, nor, in fact, is it even of that direct, distinct and unequivocal nature as to any pre-existing liability which is essential to an acknowledgment from which the law may imply a promise. It is, of course, well understood that, in order to resuscitate a cause of action which has once been relegated to a state of repose by the operation of the statute of limitations, it is necessary under the law (Code Civ. Proc., sec. 360) that there must have been executed, as to the debt, obligation or liability originally giving rise to such cause of action, an instrument in writing, signed by the party to be charged. This is not only true, but where there is no express promise, such instrument must contain an acknowledgment from which the law may imply a promise to pay. (*Biddel v. Brizzolara*, 56 Cal. 382.) And such acknowledgment must be a direct and unqualified admission of an existing debt which the party is *willing to pay*. (*Biddel v. Brizzolara*, 56 Cal. 382; *McCormack v. Brown*, 36 Cal. 180, [95 Am. Dec. 170]; *Farrell v. Palmer*, 36 Cal. 187.) "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and

direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be *accompanying circumstances* which *repel* the promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action." (Mr. Justice Story in *Bell v. Morrison*, 1 Pet. (U. S.) 362.)

The first letter addressed to the plaintiff by the defendant upon the subject of the alleged debt due the estate from defendant was written under date of May 18, 1903—over seven months prior to plaintiff's appointment as administrator, etc.—and was evidently occasioned by a demand made upon defendant for a settlement of the balance which appeared to be due the deceased from the statement referred to. This letter, which is of considerable length (and which was admitted in evidence upon the offer of the defendant), from its beginning to its conclusion, repeatedly declares that at the time of the death of plaintiff's intestate the latter was indebted to the defendant in a large sum of money, and that the defendant owed the deceased nothing at the time of his death. This statement, he asserts, he could establish to the satisfaction of plaintiff if the latter would call at his office and inspect his books and papers showing the accounts between the deceased and the defendant. A garbled quotation from this letter by appellant in his brief, embracing only a part of the only sentence in the letter upon which he could place any construction favorable to his contention, can afford him no comfort, because there is nothing in the quoted language from which any sort of an acknowledgment of the old debt may be drawn. The second letter, under date of June 12, 1903, written, it will be noticed, over six months before plaintiff was appointed administrator of the estate, reiterates the denial that defendant was in any way or to any extent indebted to Visher at his death. The letter dated March 15, 1904, addressed to plaintiff, is brief and reads as follows: "Dear Sir and Brother: Your favor of the 14th is just received and noted. In answer will say that if the Visher estate has any valid claim against me I will pay it if I ever get money enough to do so. Please send me the claim." There was also received in evidence a letter dated

October 14, 1900, signed by the defendant and addressed to the wife of plaintiff, which letter, even if it were material to the issue here, does not refer, either directly or indirectly, so far as it may be determined from the language of the letter itself, to the claim relied upon in the complaint. It is thus to be observed that the only one of the mentioned letters upon which appellant can by any possibility rest the contention that the defendant has acknowledged the claim relied upon in this action, is the one dated March 15, 1904, written after letters of administration had been issued to plaintiff. This letter, it must be apparent from an inspection thereof, is not an unqualified and unconditional acknowledgment by defendant of any claim or debt which might have existed against him in favor of the deceased or his estate. Construed, as it should be, in connection with the defendant's letters of May 18, 1903, and June 12, 1903, in which, as seen, he made an unqualified denial of any indebtedness of whatsoever nature, and particularly of the debt in dispute, this letter plainly means that, while denying, because not aware of, the existence of any claim upon him by the Visher estate, the defendant would be willing to pay any valid claim which he might be convinced said estate held against him. There is nothing in the letter from which it can, with any show of reason, be implied that the defendant admitted the validity of or promised to pay the claim sued upon, or any part thereof. As we have seen and as is obvious, the letter neither in terms nor by reasonable implication refers to the specific claim upon which the action is brought. The language of the letter constitutes neither an express promise nor an acknowledgment from which the law could imply a promise. It is a vague, indeterminate and conditional declaration that if the estate has any valid claim against the defendant, he "will pay it, if I ever get money enough to do so." The letter in question does not, in fact, contain an acknowledgment from which even a conditional promise to pay the specific debt declared upon could be implied. But if the letter could be so construed, such conditional promise is not the promise pleaded. "In an action brought upon one promise a plaintiff cannot recover upon proof of another." (*Curtis v. City of Sacramento*, 70 Cal. 416, [11 Pac. 748]; *Rodgers v. Byers*, 127 Cal. 531, [60 Pac. 42], and cases therein cited.)

There is no merit in the point that the claim filed by the defendant against the estate of the deceased after the appointment and qualification of the administrator carries with it an acknowledgment of the old debt. The claim consists of an itemized statement of expenditures made by the defendant for and on account of the deceased in his lifetime and a balance due defendant of \$209.84 after deducting the sum of \$684.35 in favor of the deceased from the total amount of \$894.19, claimed to have been so expended for deceased by the defendant. The claim does not, it is readily seen, acknowledge any indebtedness to the deceased or the estate, but, on the contrary, negatives such inference, and would not, of course, have been filed but for the claim of the defendant that the estate was indebted to him and not he to the estate.

Complaint is made that the court erred in a number of rulings upon the admissibility of evidence to the prejudice of appellant's rights. We have examined the record with care, and have found no errors prejudicial to appellant, either in the rulings or the findings of the court. The evidence, as previously stated, fully supports the findings, and from every standpoint from which the record may be viewed, we think the judgment is in perfect harmony with the facts and the law.

The judgment appealed from will, therefore, be affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 20, 1907, and the following opinion was then rendered thereon:

HART, J.—It is conceived proper, in denying the petition for a rehearing herein, to add to what has been said in the main opinion that, from our original examination of the record in this cause we felt justified in concluding that the trust theory of the complaint was adopted for no other reason than to obstruct the successful interposition of the statute of limitations against plaintiff's right of action. We concluded, from what we conceived to be a painstaking examination and careful analysis of the complaint, that the facts pleaded, with the exception of a few general averments amounting to mere conclusions of the pleader, failed to show the transaction between

the deceased and the defendant to have been of a fiduciary nature. The evidence, as disclosed by the record, fully sustains this conclusion. We were convinced that the relations, if, indeed, any at all existed at the time of Visher's death, between the defendant and the deceased, were merely those of ordinary debtor and creditor, bearing none of the essential characteristics of a trust, except the bare fact, as alleged, of the possession of money belonging to the deceased by the defendant. Under this view of the record, the evidence, we think, irrefragably established a bar to the action under the terms of section 337 of the Code of Civil Procedure. Upon the theory that the action was for money had and received upon a stated account, any evidence relevantly bearing upon the question of the alleged bar was admissible. Of equal soundness is the proposition that the moment the court finds, upon sufficient evidence, that the claim that an action is barred by the statute is sustained, and that such special plea is, therefore, well taken, any evidence that might have been offered and received in response to the issues upon the merits of the case, such evidence having no bearing whatever upon the special plea in bar, is, whether improperly admitted or not, of no consequence, and errors in the rulings of the trial court in admitting or rejecting evidence so confined to the merits are without significance or prejudice to any rights of the plaintiff or party against whom such rulings are made. But counsel argues in his petition that the errors of the trial court in the admission and rejection of evidence "become the more apparent" if, as we have held, the action is on an account stated, and adds: "We have already pointed out in the petition that where an account is stated between the parties thereto, it cannot be disputed, questioned, modified or changed except for mistake or fraud, which must be set up in the pleadings." This contention goes to the merits of the case, and, as we have suggested, has no force in its application to the evidence bearing upon the special plea in bar. It is only the statement of a cardinal rule of evidence to say that any competent proof was admissible which would show or tend to show that the debt declared upon was created at such point of time with reference to the time of the commencement of the suit as would bar a right of action thereon. And the defendant, if he so elected, could entirely ignore the issues involving the merits of the case and rely solely

upon his special plea in bar. The record in this case discloses no errors in the rulings of the court admitting evidence directed to the issue tendered by the special plea.

The point made by appellant in his original argument, and vigorously renewed in his petition, that the filing by the defendant against the estate of a claim, showing that at one time defendant was indebted to the deceased, but that through disbursements of certain moneys for and on behalf of deceased by the defendant the latter became a creditor rather than a debtor of the deceased, is an acknowledgment of the debt, and restores to plaintiff a right of action for the same, is, we think, without merit, and so plainly did it so appear to us in our original investigation of the record that we did not feel called upon to give it extended notice in the main opinion. Counsel, however, seems to give the question such serious consideration in his petition for a rehearing that we feel justified in giving it, briefly, further attention. The argument is that the items set forth in the claim and which show money to have been paid out for the benefit of the deceased by the defendant, and which were so set out in said claim as a setoff to any amount which might at one time have been due deceased, cannot be considered, because they had not been presented, as required by law, to the administrator of the estate of said deceased for allowance and payment; that "such claims cannot be pleaded in bar of any action, or paid until they have been thus presented, and either allowed or disallowed"; that, therefore, the admission in said claim of the original indebtedness to the deceased constitutes an acknowledgment from which the law will imply a promise to pay the debt; hence the right of recovery thereon in the plaintiff is revived. The view, briefly expressed, as to this point in the original opinion, was that there could be no such acknowledgment of an "outlawed" debt as would restore a lost right of action thereon, where a party files or submits in writing against another a claim, as to which an action could not be maintained for any legal reason, said claim showing a mutual account, according to which it appears that at one time the claimant was indebted to the party against whom it is presented, but that the latter, at the time of the filing or submission of such claim, is indebted to the claimant. How can such a claim be construed to be an acknowledgment of an old debt when the defendant by the very nature of

said claim in effect says: "Instead of being indebted to the plaintiff the latter is indebted to me"? It must, of course, be clear to the most obtuse understanding that by filing the claim it was the intention of the defendant to convey the notion that the plaintiff's intestate was indebted to him and not he to the estate. There is but one sensible interpretation of the language of the claim filed against the estate by the defendant, and that is that the defendant not only claims, but in substance declares, that he is in no way indebted to said estate in any sum or amount whatsoever. The contention that the items in said claim purporting to have been expended for the benefit of deceased by defendant are barred, or constitute an otherwise illegal demand upon the estate, cannot affect the determination of the question we are considering. Let it be granted that those items are barred and that the defendant could not maintain an action upon them. The decision of the question here can in no manner or degree be influenced by that fact. The sole question is as to the effect of the language of the claim so filed. Does it admit an old or any indebtedness, or does it deny it? It seems to us that there can be no two sides to the question. A declaration in writing in whatever form of language it may be made cannot revive a right of action once barred, unless it involves an express promise to pay the debt, or an acknowledgment from which the law will imply a promise. And, as we have seen from an examination of the authorities cited in the main opinion, such acknowledgment must be clear, distinct and direct—not vague, indeterminate and uncertain. It will not be contended that the claim contains language expressly promising to pay the debt, to recover which the suit is brought, and, as previously suggested, the very nature of the document itself—the very intrinsic character of it, in purpose and effect—completely negatives the idea of an admission of any acknowledgment of an indebtedness to the deceased or his estate by the defendant.

The petition for a rehearing is denied.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 18, 1907.

[Crim. No. 84. First Appellate District.—May 24, 1907.]

Ex Parte WALTER SWEETMAN, on Habeas Corpus.

BERKELEY CHARTER—PROVISION AUTHORIZING PENALTY FOR ILLEGAL SALE OF LIQUORS—CONFLICT WITH PENAL CODE.—The charter of the town of Berkeley, having been adopted prior to the amendment of 1896 to the constitution, was subject to general laws; and the trustees had no power thereunder to pass an ordinance affixing a penalty for the sale of liquors without a license in conflict with the Penal Code, and the original invalidity of such power was not affected by that amendment.

ID.—VOID PENALTY UNDER ORDINANCE—CONVICTION UNDER PENAL CODE.—A conviction in the justice's court of the town of Berkeley of a misdemeanor for the sale of liquor without a license, as required by an ordinance of the town, containing a void penal clause, is valid under the Penal Code, and the higher penalty affixed therein may be imposed.

PETITION for discharge upon writ of *habeas corpus* under a judgment imposed in the justice's court of Berkeley, Alameda County.

The facts are stated in the opinion of the court.

Brewton A. Hayne, and Roland C. Becsey, for Petitioner.

Redmond C. Staats, for Respondent.

HALL, J.—Petitioner asks to be discharged from custody under a judgment rendered by the justice court of the town of Berkeley, upon his conviction of a misdemeanor for maintaining a place where alcoholic liquors were sold, without having a license therefor as required by the ordinance of the town of Berkeley.

The judgment imposes a fine of \$500 upon petitioner, with the usual alternative of imprisonment not exceeding six months in default of payment.

It is insisted by petitioner that both the charter of the town of Berkeley and the ordinance under which petitioner was prosecuted limit the fine that may be imposed to the sum of \$300, and that therefore the judgment, being for a greater

sum, is void. On the other hand, respondent insists that the offense committed by petitioner is made punishable by the general law of the state, to wit, sections 19 and 435 of the Penal Code, and that said sections are controlling, and as the judgment is in terms authorized by said sections it is valid.

No point is made by petitioner that the complaint does not charge petitioner with carrying on a business without having a license therefor, or that the ordinance does not require a person conducting such business to have a license therefor. We have, therefore, not critically examined the ordinance or the complaint in this respect. (But see *Ex parte Mansfield*, 106 Cal. 400, [39 Pac. 775].)

The charter of the town of Berkeley is a "Freeholders" Charter adopted in 1895, and therefore antedates the amendment to the Constitution of 1896, relieving provisions of such charters in "municipal affairs" from the control of general laws.

The charter of the town of Berkeley provides as follows: "Sec. 50. The Board of Trustees shall have power: 1. . . . 5. To license for purposes of regulation and revenue all and every kind of business not prohibited by law to be transacted or carried on in said town, and all shows, exhibitions and lawful games carried on therein; to fix the rates of license upon the same, and to provide for the collection of the same by suit or otherwise. . . .

"21. To impose fines, penalties and forfeitures for any and all violations of ordinances, and for breach or violation of any ordinance, to fix the penalty by fine or imprisonment, or both, but no such fine shall exceed three hundred dollars, or such imprisonment exceed three months. . . .

"24. To do and perform any and all other acts and things necessary and proper to carry out the provisions of this Charter, and to enact and enforce within the limits of the Town all other local, police and other regulations as do not conflict with the general laws."

The penal clause of the ordinance violated by petitioner conforms to subdivision 21 of section 50, and provides for a fine of not less than \$50, nor more than \$300, or imprisonment of not less than thirty days nor more than ninety days, or both such fine and imprisonment.

At the time of the adoption of the charter of the town of Berkeley, and ever since such time, the general law of the state made it a misdemeanor, punishable by fine not exceeding \$500, or imprisonment not exceeding six months, or both, for any person to commence or carry on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law. (Pen. Code, secs. 19, 435.) And municipal ordinances are laws of this state within the meaning of section 435 of the Penal Code. (*In re Lawrence*, 69 Cal. 611, [11 Pac. 217]; *Ex parte Christensen*, 85 Cal. 208, [24 Pac. 747].)

The language of subdivision 21 of section 50 of the Berkeley charter is broad enough, standing alone, to authorize the town trustees to prescribe that for carrying on a business for which a license is required, without first obtaining such license, a fine not exceeding \$300, or imprisonment not exceeding three months, shall be imposed. That a municipal ordinance that should prescribe that for a given offense a fine not exceeding \$300 may be imposed is contrary to a general law providing that for the same offense a fine not exceeding \$500 may be imposed, seems to us too clear for serious argument. Indeed, it has been held in this state that a conflict exists where an ordinance provides a penalty for the same acts that are punishable under the general law, and that the penal clause of such an ordinance is void. (*In re Sic*, 73 Cal. 142, [14 Pac. 405]; *Ex parte Mansfield*, 106 Cal. 400, [39 Pac. 775]; *Ex parte Stephen*, 114 Cal. 278, [46 Pac. 86].)

In *Ex parte Mansfield*, 106 Cal. 400, [39 Pac. 775], the penal clause of a license ordinance prescribed a fine of not less than \$150, and not more than \$500, for carrying on the business of selling liquor without procuring a license therefor; and it was held that such penal clause conflicted with section 435 of the Penal Code, and was for that reason void, but that the judgment in the case was valid under the provisions of the Penal Code.

In *Ex parte Stephen*, 114 Cal. 278, [46 Pac. 86], the ordinance provided that anyone carrying on the liquor business without first procuring a license shall be guilty of a misdemeanor, and punishable by fine of not less than \$50 nor more than \$200, or by imprisonment for not less than one hundred days. The petitioner was fined \$250 with the

usual alternative of imprisonment. It was held that the judgment was good under sections 19 and 435 of the Penal Code, and that the penal clause of the ordinance was void. The court said: "For that portion of section 1 prescribing the punishment must be held void as in contravention of the general law of the State. It undertakes to punish the same act—carrying on a business without having a license therefor—which is punishable under section 435 of the Penal Code."

If an ordinance that attempts to fix the penalty for carrying on a business, for which a license is required, is to that extent in conflict with sections 19 and 435 of the Penal Code, and therefore to that extent void, it seems to us clear that any provision of a municipal charter, which authorizes the municipality to fix the penalty for carrying on such business without a license therefor, conflicts with the same sections, and for that reason, if adopted prior to the amendment to the constitution of 1896, void at the time of its adoption.

The language of subdivision 21 of section 50 of the Berkeley charter must be limited in its effect to giving to the board of trustees power to fix penalties for such violation of ordinances as are not covered by the general law of the state. So far as the said section attempts to authorize the board of trustees to fix any penalty for carrying on a business without procuring a license therefor, it was at the time of its adoption in conflict with sections 19 and 435 of the Penal Code, and therefore to that extent void. (*Ex parte Sic*, 73 Cal. 142, [14 Pac. 405]; *Ex parte Mansfield*, 106 Cal. 400, [39 Pac. 775]; *Ex parte Stephen*, 114 Cal. 278, [46 Pac. 86].)

So far as a charter was void at the time of its adoption it is still void, notwithstanding the amendment to the constitution of 1896. This principle is established by *Banas v. Smith*, 133 Cal. 102, [65 Pac 309].

It thus follows from what we have said that there is not now, and never has been, any authority in the board of trustees of the town of Berkeley to fix a penalty for carrying on a business without procuring a license therefor. Under subdivision 5 of section 50 of the charter of Berkeley the trustees may require a license to be paid for the carrying on of any lawful business, but when it has done that the general law of the state (Pen. Code, secs. 19 and 435) makes the carrying on such business without procuring such license a

misdeemeanor, and fixes the penalty therefor. The fact that the ordinance in this case was passed subsequent to the adoption of the amendment to the constitution of 1896 makes no difference. The validity of the ordinance depends upon the power of the board of trustees, which, as we have seen, does not exist to fix any penalty for the offense provided for by sections 19 and 435 of the Penal Code.

The judgment against the petitioner is valid under sections 19 and 435 of the Penal Code, and he must be remanded to the custody of the sheriff of Alameda county, and it is so ordered.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 325. Second Appellate District.—May 24, 1907.]

CHARLES Z. S. TOWNSEND, Respondent, v. **PHILIP S. DRIVER et al.**, Defendants. **SAN DIEGO REALTY COMPANY et al.**, Interveners, Appellants.

ACTION TO QUIET TITLE—INTERVENTION—TITLE CLAIMED BY INTERVENERS—EFFECT OF ORDER.—An action to quiet title is one for the recovery of real property; and an order of the superior court granting leave to interveners, who claim title against the plaintiff to intervene, determined that the interveners had an interest in the matter in litigation.

ID.—RIGHTS OF INTERVENERS—PROCEDURE AND REMEDIES OF DEFENDANTS.—Under section 387 of the Code of Civil Procedure, such interveners were entitled as parties to avail themselves of all the procedure and remedies to which the defendants were entitled for the purpose of defeating the action or resisting the plaintiff's claims.

ID.—ADVERSE INTEREST—POSITION OF INTERVENERS.—Where the interveners claimed the exclusive title and served their complaint in intervention upon all parties, their claim to the subject matter is an interest adverse both to the plaintiff and to defendants; but as against the plaintiff, they occupy under the law the position of plaintiffs in intervention uniting with defendants in the cause in resisting the demands of the plaintiff in the cause.

ID.—INACTION OF DEFAULTING DEFENDANTS—INTERVENERS NOT PREJUDICED.—The inaction of the defendants in permitting their default does not preclude the interveners from their relief.

ID.—RIGHT OF PLAINTIFF TO DISMISS—DISMISSAL AGAINST INTERVENERS—RELIEF AGAINST DEFENDANTS.—Where it appears that the only relief sought by the interveners was that plaintiff take nothing and that interveners recover costs, the plaintiff had the right completely to dismiss the action against all of the defendants, and the interveners; but where he did not elect to do so, he had no right to dismiss the action as to the interveners only, and then proceed to take the relief sought against the other defendants, without disposing of the issues raised by the complaints in intervention, where the order allowing the intervention had not been set aside.

ID.—ERRONEOUS REFUSAL TO VACATE JUDGMENT.—Where the partial dismissal against the interveners was by action of the plaintiff only, and not by order of the court, the court erred in refusing an application of the interveners to set aside the judgment against the defendants, because notice of the hearing was not served upon the interveners nor waived by them.

ID.—RECITAL IN JUDGMENT—DISMISSAL BY PLAINTIFF—ORDER OF COURT NOT PRESUMED.—Where the judgment entered recited that the action as to the interveners was dismissed by plaintiff, and does not purport to make any order or direction upon the part of the court, the doctrine of intendment in favor of the judgment cannot be carried to the extent of presuming that done by the court which it expressly declares to have been done by the plaintiff.

ID.—LIMITED POWER OF COURT AS TO DISMISSAL—TRIAL UPON MERITS.—The court has no other power of dismissal, either as an entirety or as against parties, except as authorized by section 581 of the Code of Civil Procedure. In all other cases the action must be tried upon its merits. An order dismissing the action as to the interveners would be unauthorized.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

Collier, Smith & Hoff, for Interveners, Appellants.

Mills & Hizar, for Respondent.

ALLEN, P. J.—Appeal from a judgment quieting title and from an order denying motion to vacate such judgment.

Plaintiff filed his complaint under section 738, Code of Civil Procedure, for the purpose of determining adverse claims to certain described real estate. To this complaint ap-

pellants were not made parties, but the court by its order, good cause appearing, granted appellants leave to intervene, which they did by filing their several complaints in intervention, denying plaintiff's ownership of the premises, or that he was in possession or entitled to possession thereof; and each complaint in intervention alleging further that interveners were the owners and entitled to possession of specified portions of the lands described in the complaint. Thereupon the attorneys for plaintiff filed in the clerk's office a written direction to the clerk to enter a dismissal of the action as to certain named defendants, in which appears the names of interveners. Afterward, and without notice of any character to interveners, the court ordered the default of certain defendants not included in the order of dismissal to be entered and gave judgment against such defendants, wherein the court decreed that plaintiff was the owner and in possession, and entitled to the possession, of all the premises in the complaint described and quieted plaintiff's title therein; in which judgment it is recited that plaintiff, appearing by his attorneys, dismissed as to defendants (naming those mentioned in the direction to the clerk). But in neither the order to the clerk nor the judgment are interveners designated as such; nor does it appear that any order was made by the court vacating its order granting leave to intervene, unless the recital in the judgment of the action of the attorneys be construed as such order.

Interveners, within due time, moved the court to vacate and set aside its judgment, because no notice of the trial of the action was given interveners or their attorneys, which motion was denied and said judgment duly entered in the judgment-book; from which judgment, and from the order refusing to vacate the same, appellants duly appeal upon a bill of exceptions.

The action to quiet title is one for the recovery of real property. (*South Tule etc. Ditch Co. v. King*, 144 Cal. 455, [77 Pac. 1032].) The real property so sought to be recovered is, therefore, the subject matter of such action. The order of the superior court granting leave to intervene determined that interveners had an interest in the matter in litigation, and under section 387, Code of Civil Procedure, were entitled as parties to avail themselves of all of the procedure and remedies to which the defendants were entitled

for the purpose of defeating the action or resisting plaintiff's claim. (*People v. Perris Irr. Dist.*, 132 Cal. 290, [64 Pac. 399, 773].)

It appears from the bill of exceptions that interveners served and filed their complaints, setting forth the grounds upon which their intervention rested, due service of which is certified in the bill, which must be accepted as service upon all parties to the action, as required by section 387, Code of Civil Procedure, and the claim to the subject matter is an interest adverse to both plaintiff and defendants. The only relief sought, however, by these complaints in intervention was that plaintiff take nothing and that interveners recover costs. Under the law, their position was thereafter that of "plaintiff in intervention, uniting with the defendant in the cause in resisting the demands of plaintiff in the cause." (*St. Charles R. R. Co. v. Fidelity etc. Co.*, 109 La. 491, [33 South. 574].) The inaction of the defendants in permitting their default does not preclude intervenor from his relief. (*People v. Ferris Irr. Dist.*, 132 Cal. 290, [64 Pac. 399, 773].) That plaintiff in such action may dismiss the same, where the relief sought by interveners is only "that plaintiff take nothing," is determined in *Henry v. Vine-land Irr. Dist.*, 140 Cal. 377, [73 Pac. 1061]; the reason assigned is that "by a complete dismissal of the action plaintiff has consented to take nothing and thereby the ends of the intervention are accomplished." But in this case plaintiff does not so elect, but seeks to maintain his action against certain defendants and proceeds to judgment against them, and by such judgment takes the relief sought. After the court has determined by its order that a party has an interest in the subject matter of a suit and should be permitted to litigate such interest therein, it is not within the power of the plaintiff, either under the provisions of section 581, Code of Civil Procedure, or otherwise, to annul such order of the court by dismissing the action as to such parties, and unless the court vacates the order permitting intervention, the plaintiff, so long as he seeks relief under the action, must meet such issues raised by the complaints in intervention. There is nothing in the record to justify the conclusion that the court vacated its original order permitting intervention. The dismissal was directed by the plaintiff, and the judg-

ment only purports to recite such action on the plaintiff's part and does not purport to make any order or direction upon the part of the court. The doctrine of intendment in favor of a judgment cannot be carried to the extent of presuming that done by the court which it directly declares to have been done by a party to the action. Nor could the court, under our practice, dismiss an action, either as an entirety or as against parties, except as authorized by section 581 of the Code of Civil Procedure. Any judgment of the court not authorized by that section must be upon merits. (Code Civ. Proc., sec. 582.) Hence, were we to construe the language of the recital in the judgment as an attempt upon the part of the court to order a dismissal as to the interveners it would be unauthorized. There is nothing in *Alpers v. Bliss*, 145 Cal. 571, [79 Pac. 171], establishing a different proposition. Interveners then being parties by authority and the action still pending, and no order of the court being entered vacating the former *ex parte* order permitting intervention, and the issues of fact tendered by the complaints in intervention being still undetermined, the court could not hear and determine such issues in the absence of the adverse parties without the five days' notice prescribed by section 594, Code of Civil Procedure, unless such notice was waived by the interveners directly, or some act amounting to a waiver is made to appear. There is nothing in the record indicating notice or waiver thereof upon the part of the interveners.

The court erred in refusing to vacate said judgment so rendered, and in entering a judgment granting the relief to plaintiff before the issues of fact were heard and determined.

It is ordered that the order refusing to vacate the judgment and the judgment so entered be reversed and the cause remanded for further proceedings.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 372. Second Appellate District.—May 25, 1907.]

**KATE BEKINS, Appellant, v. MINNIE DIETERLE and
WILLIAM DIETERLE, Respondents.**

APPEAL FROM PART OF JUDGMENT—VACATION OF TEMPORARY INJUNCTION—TIME FOR APPEAL—MOTION TO DISMISS.—An appeal taken from that part of a final judgment wherein it is adjudged "that the temporary injunction heretofore issued herein to the sheriff of the county be and the same is hereby vacated," is not taken from an order within the meaning of section 939 of the Code of Civil Procedure; and it will not be dismissed on the ground that it was not taken within sixty days.

MOTION to dismiss an appeal from part of a judgment of the Superior Court of Los Angeles County. W. P. James, Judge.

The facts are stated in the opinion of the court.

J. Marion Brooks, and Henry E. Willis, for Appellant.

E. W. Freeman, and A. D. Laughlin, for Respondent.

SHAW, J.—Motion to dismiss an appeal from that portion of the judgment wherein it was adjudged "that the temporary injunction heretofore issued herein to the sheriff of said county be and the same is hereby dissolved and vacated."

The appeal was not taken within sixty days from the entry of this judgment, and upon this ground respondent insists that the same should be dismissed. The judgment was not an order within the meaning of section 939 of the Code of Civil Procedure, and the motion to dismiss is denied.

Allen, P. J., and Taggart, J., concurred.

[Crim. No. 74. First Appellate District.—May 27, 1907.]

**THE PEOPLE, Respondent, v. FONG CHUNG, alias FAT
JIM, Appellant.**

CRIMINAL LAW—RAPE—TRIAL—CONTINUANCE—ABSENCE OF MATERIAL WITNESS—INSUFFICIENT ADMISSION BY DISTRICT ATTORNEY.—Upon a prosecution for rape, it was error for the court to refuse to postpone the trial, on motion of the defendant, for the absence of a material witness, who had been duly served with subpoena, but who was too ill to attend, and whose testimony set forth in the affidavit would prove an alibi at the time of the alleged crime, merely because of an admission by the district attorney that the witness would testify to everything that is material in the affidavit without admitting the truth of the facts set forth therein. Such action of the court involves a denial of the constitutional right of the defendant to have the witness orally examined in court.

ID.—EVIDENCE—VENEREAL DISEASE OF PROSECUTRIX—ABSENCE OF DISEASE OF DEFENDANT.—Upon the trial of the prosecution for rape, it was error for the court to refuse to permit the defendant to prove that at the time of the alleged offense the prosecutrix was afflicted with venereal chancroids; that she had had promiscuous intercourse with a great number of other persons before that time, and that the defendant has never in his life had that disease.

ID.—FAILURE TO MAKE OUTCRY—IMPRISONMENT OF WITNESS.—It was error for the court to refuse to permit the defendant to prove that the girl made no outcry, and that she was kept under imprisonment, and was allowed to see no one but the sheriff and his deputies, and the district attorney and his deputies and detectives. Such testimony should have been allowed as affecting the credibility of the witness.

ID.—ERROR IN ALLOWING INSULTING CROSS-EXAMINATION—FACTS IMPLIED WITHOUT PROOF.—It was error to allow the district attorney to ask indecent, improper and insulting questions on cross-examination of a witness for defendant as to particular wrongful acts, tending to degrade his character, and to create the belief that defendant was in the habit of seducing young girls, without any proof thereof. The fact that the witness denied that the facts involved in the questions were true did not cure the error in allowing questions in violation of sections 2051, 2065 and 2066 of the Code of Civil Procedure. These provisions apply alike to the protection of all witnesses.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

John W. Sullivan, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

COOPER, P. J.—The defendant is charged in the indictment with the crime of rape, in having had sexual intercourse, on the twenty-sixth day of September, 1905, with Lillie Ida Davis, an unmarried female under the age of sixteen years.

After trial the jury returned a verdict of guilty, and judgment was thereupon entered, sentencing defendant to a term of ten years in the state prison.

The facts disclosed by this record are revolting. The party upon whom the rape is alleged to have been committed was just thirteen years of age, and had an elder sister, Eliza, who was fifteen. It seems, with the apparent knowledge and consent of the father and mother, that these two young girls were and had been in the habit of having sexual intercourse with Chinamen and other parties at their home, in which the father and mother and the smaller children of the family resided. For this they received small sums of money and presents. There were six other cases of alleged rape upon these sisters, charged to have been committed by different individuals, pending and set for hearing at the time this case was called. Three of these were apparently against Chinamen, and three of them against white men or boys. The sisters were each suffering from venereal disease. While it is not clear that such disease existed at the time of the alleged crime by this defendant, it is clear that it existed, and both sisters were afflicted with it when examined a short time afterward. The offense is statutory, and no matter how depraved was the girl upon whom the act is alleged to have been committed, nor how many others were equally guilty, the defendant would be held none the less amenable to the law for his acts, if the evidence supported the verdict and no

error appeared of record; but as the offense charged is one that of itself creates a feeling of prejudice and hostility in the minds of the jury, particularly in the case of a Chinaman, the court will look carefully into the record to see that all the substantial rights of the defendant were given him by the trial court.

In this class of cases, as well as in all others, a defendant should be fully protected during the trial in all his rights, and if he cannot thus be convicted, he should not be convicted at all.

The first contention made by defendant is that the court erred in refusing to postpone the trial for a reasonable time on account of the absence of a material witness, and the contention must be sustained. When the case was called for trial the defendant's counsel answered that he was not ready, and moved for a continuance on account of the absence of Charlie Yan Tie, a material witness for defendant. In support of the motion counsel for defendant offered and read the affidavit of defendant, which stated in substance that Charlie Yan Tie was a material witness, without whose testimony he could not safely proceed to trial; that a subpoena had been duly issued and served upon the said witness several days before the day set for trial; that the witness was seriously ill, under the care of a physician, and unable to appear in court; that the defendant could prove by said witness, if present, and expected to prove by him, that defendant was not in the presence of said Lillie Ida Davis at the time of the commission of the alleged crime; that the defendant bought from said witness two dress skirts and sold the same at a profit to the two Davis sisters, and that the defendant's reputation for truth, veracity, peace and quietude is good; that defendant could not prove the said facts by any other witness.

In support of said motion defendant's counsel testified that before the trial, and immediately upon learning of the illness of the said witness, he notified the district attorney that the witness was ill, and that defendant could not safely go to trial on the day set. Dr. Trueman testified that he was attending the witness Charlie Yan Tie, and that the witness was in bed very ill, with a high fever, suffering from blood poisoning, and would not be out of bed for at least

three weeks, and that it would be dangerous for said witness to attend court.

Upon the above showing the judge remarked to the district attorney that in his opinion the continuance would have to be granted. The district attorney thereupon remarked, "We will concede that this Chinaman will testify to anything in that affidavit—everything that is material." Thereupon the court denied the continuance, and to this ruling the defendant duly excepted.

It must be borne in mind that no question was raised as to the sufficiency of the facts as stated in the affidavit. The ruling of the court was based squarely upon the theory that the admission of the district attorney to the effect that the absent witness, if present, would testify to anything in the affidavit, answered the purpose and obviated the necessity of a continuance; that the statements in the affidavit could be taken in lieu of the evidence of the witness. Such is not the law. The constitution of the state (article I, section 13) gives a defendant the right to have the process of the court to compel the attendance of witnesses in his behalf. It is the duty of the court, when due diligence has been used, and it appears that the application is made in good faith, and the evidence is material, to continue the case for a reasonable time so that the case may be fairly tried on its merits.

In the early case of *People v. Diaz*, 6 Cal. 248, it was held that the admission of the district attorney that the witness, if present, would have testified as set forth in defendant's affidavit, was not sufficient, but that in order to obviate the necessity of a continuance, the district attorney should have admitted the truth of the facts set forth in the affidavit. The court said: "The materiality of the evidence having been shown, it was the duty of the court, in the absence of evidence tending to discredit or throw suspicion on the application to postpone the cause, to afford the prisoner reasonable time to secure the attendance of his witness. It was not sufficient that the district attorney agreed that the witness would have deposed to certain facts, if present; he should have admitted the truth of the facts absolutely. It was the right of the accused to have his witnesses orally examined in court; and this right could not be frittered away by compelling him

to go to trial in their absence without the benefit of their testimony upon a statement of what the evidence would be, subject to impeachment. The value of oral testimony over all other is too well understood to suppose for a moment that such declarations will have the same weight on the minds of the jury as the testimony of the witness if he had been examined before them in open court."

The above case has never been overruled or modified by any case to which our attention has been called. It has been followed in *Graham v. State*, 50 Ark. 167, [6 S. W. 721], and in *Newton v. State*, 21 Fla. 70. Its reasoning is logical. The district attorney could not by a concession as to "this Chinaman" deprive the defendant of the benefit of a substantial right. It was the time and the occasion when his each and every right should have been guarded both by the district attorney and the court. It was the first continuance asked. There was no question raised as to the good faith of the defendant in making the application. If the question as to the good faith of the application, or the sufficiency of the matters and things stated in the affidavit, had been raised, and sufficient showing made so as to appeal to the discretion of the court, the question would be different; but here we have squarely presented the ruling of the court based upon the statement of the district attorney quoted above. The court not only proceeded upon such theory, but instructed the jury to regard the statement in the affidavit as part of the evidence in the case, "as though Charlie Yan Tie had in open court as a witness so testified."

The evidence on the part of the prosecution tended to show that the alleged act of sexual intercourse took place about 7 o'clock of the evening of September 26, 1905. Lillie Ida Davis so testified. In cross-examination the defendant's counsel asked her the following question: "Q. Now, is it not a fact that on the twenty-sixth day of September last, at 7 o'clock in the evening, you had venereal and running sores on your private parts, in your vagina and on the lips thereof?" The district attorney objected to the question as irrelevant, immaterial, incompetent and not proper cross-examination. The court sustained the objection, to which ruling defendant duly excepted. The ruling of the court was erroneous. Dr. McMahon, a witness for the prosecution, tes-

tified that he examined the girl in October, 1905, and that she was then suffering from venereal disease. In fact, the evidence shows without contradiction that she had such disease early in October, 1905. Defendant testified that he never at any time had sexual intercourse with Lillie Ida Davis, and that he had never had any kind of venereal disease in his life. Dr. Cothran, a graduate of the medical department of the University of California, testified that he examined defendant about two weeks before the trial for any evidence of any variety of venereal disease; that he examined physically all the parts affected in such cases, and that defendant had never had chancroids (the disease from which the girl was suffering). The evidence shows that in most cases a male having sexual intercourse with a female suffering from venereal chancroids would contract the disease. Now, if defendant had no venereal disease, and never had chancroids, it seems to us that it was very material as to whether or not the girl, with whom he is alleged to have had sexual intercourse, was suffering from venereal disease on the day of such alleged intercourse. What reason was there for excluding the evidence? The prosecution apparently desired to prove that in October, 1905, the girl was suffering from chancroids. This might, and was probably intended to, carry with it the inference that she contracted the disease from the defendant on the twenty-sixth day of September. Defendant had the right to meet this inference by showing that she had such disease on the twenty-sixth day of September. He further had the right to prove, and did prove, that he had never had such disease. Upon all the facts thus proven the jury had the right to determine the guilt or innocence of defendant. The court refused to allow any evidence as to whether or not the girl was suffering from the disease on the twenty-sixth day of September. The objection of the district attorney was sustained to a similar question asked of Eliza, the sister of the girl. Eliza was asked the direct question as to whether or not Lillie had chancroids, or running sores, on her private parts on the twenty-sixth day of September, 1905, but under the objection of the district attorney she was not permitted to answer it. The mother of the girl testified that she had chancroids on the twenty-sixth day of September, 1905; but it

appearing on cross-examination that the mother only knew it by Eliza telling her, the court, on the motion of the district attorney, struck out the testimony. The rulings of the court in this regard were highly prejudicial to defendant.

Other rulings are complained of which appear to be erroneous, but which it is not necessary to discuss in detail. The defendant's attorney asked Lillie Ida Davis in cross-examination if she had had intercourse with anyone else in the past year. Upon objection of the district attorney, the court refused to allow the question to be answered. She was further asked by defendant's attorney if she had not had sexual intercourse with a great number of Chinamen in her bedroom at her home during the past year. The court sustained the objections of the district attorney to this line of questions. The defendant's attorney then asked questions as to particular named Chinamen and as to dates prior to September 26, 1905; but the court made the same ruling excluding the evidence. While the facts sought to be elicited by these questions would not justify the defendant in having sexual intercourse with a girl under sixteen years of age as a matter of law, yet they were competent for the purpose of aiding the jury in arriving at the main facts. If the fact that the girl was suffering from a venereal disease a short time after the alleged act of intercourse was a circumstance tending to corroborate the girl's testimony as to the act with defendant, by raising an inference that the venereal disease was communicated by defendant, the defendant, in that spirit of fairness which should prevail in all trials, should have been permitted to show that the girl might have been diseased by sexual intercourse with others. Or it might be that defendant could have shown that the girl was mistaken in his identity, and that it might have been some other Chinaman. The evidence sought to be elicited by the questions would have tended to show the credibility of the girl. If she had been having promiscuous sexual intercourse with Chinamen, or if she had been diseased by sexual intercourse with others prior to the date when it was shown that she had such disease, the jury had the right to consider these matters. We do not think the conviction of the defendant, under the circumstances of this case, was so

important that everything else except the single fact should have been excluded from the jury. The district attorney in his zeal desired the case to be presented to the jury upon evidence as to the one act with defendant, and the corroborating fact of the girl having a venereal disease. Such facts alone would give him a beautiful theory as to the defendant's outrage upon an innocent girl of tender years, and his giving her a venereal disease; but the defendant had some rights. If the girl was suffering from a venereal disease on September 26th, and defendant never had such disease, it is a strong circumstance in favor of the testimony of defendant. If the girl was entertaining a great number of Chinamen in the same manner, it was very important for defendant to show that she may have been mistaken as to his identity. It was said in *People v. Howard*, 143 Cal. 316, [76 Pac. 1116] (a similar charge to this), "The light of investigation should have been permitted to fall upon the witness, her statement and her conduct. If she was testifying to the truth, such investigation would not have injured the cause of the prosecution. If she was testifying to a falsehood, the defendant should have been allowed in every reasonable way to show it."

In a concurring opinion by the chief justice it was said that if the prosecuting witness made no outcry or complaint to others, or if she was induced by threats of imprisonment to make the accusation, the jury had the right to take these facts into consideration in determining her credibility. The court in the case at bar refused to hear evidence that the witness made no outcry. The defendant's counsel endeavored to prove by cross-examination of the prosecuting witness that ever since she was placed in jail, October 16, 1905, no one was permitted to see her except the sheriff and his deputies, the district attorney and his deputies and detectives. The court, under the objection of the district attorney, would not allow the testimony. It seems to us that such testimony should have been allowed, and would affect the credibility of the witness. That a prosecuting witness of tender years was in a case like this kept in the sole custody and control of the officers of the law, and permitted to see no one else, is a circumstance that the jury should have known. Every

lawyer and every judge under such circumstances would at once infer that the witness was testifying under the influences that had been surrounding her.

Sam Chew was called, and testified for the defendant. Under defendant's express objection and protest the district attorney was allowed to ask the witness many insulting and immaterial questions on cross-examination. Among these the district attorney asked the witness if he had not heard in Chinatown that the defendant was taking little white girls down there, and was warned that he would get into trouble if he continued it; if he had not heard that the members of the Hop Sing Tong accused defendant of producing white girls there; if it was not a fact that witness was conducting a lottery on First street back of Bachigalupi's cigar store; if witness was not selling lottery tickets at such place; if he was not running a poker game at the same place; if witness was not selling lottery tickets and running a poker game up to the time the grand jury before last began to investigate those things. We can conceive of no reason why such questions should have been allowed. It is true that the witness denied that any of the matters were true that were implied by the questions, but that does not cure the error. The district attorney did not attempt to prove the truth of any of the many things implied by the questions. They may have entirely destroyed the effect of the testimony of the witness, and, more than that, they may have created the belief that defendant was in the habit of seducing young girls. A witness cannot be impeached by evidence of particular wrongful acts except it may be shown that he has been convicted of a felony. (Code Civ. Proc., sec. 2051.) A witness need not give an answer which will have a tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed (Code Civ. Proc., sec. 2065). Not only this, but a witness has the right to be protected from irrelevant, improper or insulting questions (Code Civ. Proc., sec. 2066). The above provisions of the code apply alike to all witnesses; whether the witness be a Chinaman, a negro, one in the most humble walks of life or one in high position, the rule is the same.

It is not necessary to consider other questions raised in the briefs.

The judgment and order are reversed.

Kerrigan, J., concurred.

Hall, J., concurred in the judgment.

[Crim. No. 77. First Appellate District.—May 27, 1907.]

Ex Parte J. P. MOGENSEN on Habeas Corpus.

MUNICIPAL INCORPORATION ACT—AMENDMENT—TOWNS OF SIXTH CLASS —REPEAL OF CODE PROVISIONS.—By the amendment of the municipal incorporation act, March 9, 1903, section 3366 of the Political Code was repealed by implication, as far as regards towns of the sixth class.

ID.—MUNICIPAL ORDINANCE—PROHIBITION OF LIQUOR TRAFFIC—POLICE POWER.—By the re-enactment of subdivision 10 of section 862 of the municipal act of 1883 in the amended municipal incorporation act of 1903, as respects towns of the sixth class, a town of that class has police power under section 11 of article XI of the constitution to pass a municipal ordinance prohibiting the liquor traffic.

ID.—HABEAS CORPUS—SUFFICIENCY OF COMPLAINT.—A complaint charging conjunctively in the language of the ordinance all of the alternative prohibitions therein contained, as having been unlawfully and willfully done on a date specified must be deemed, upon *habeas corpus*, to be certainly a sufficient statement of the offense intended to be charged.

ID.—SUFFICIENCY OF JUDGMENT—RECITAL OF VIOLATION OF ORDINANCE —DESIGNATION OF OFFENSE.—A judgment of conviction reciting that the petitioner was duly convicted of violating an ordinance of a town named of the sixth class, designated by its number and title, and adjudging the offense of violating the same, as charged in the complaint, and that it be punished by a suitable fine, contains a sufficient designation of the offense charged.

APPLICATION for discharge under a writ of *habeas corpus* from the custody of the sheriff of Santa Clara County, under a conviction upon a charge of violating an ordinance of the town of Los Gatos.

The facts are stated in the opinion of the court.

A. H. Jarman, and R. F. Robertson, for Petitioner.

James H. Campbell, District Attorney, for Respondent.

KERRIGAN, J.—The petitioner was convicted upon a charge of violating an ordinance of the town of Los Gatos, prohibiting the alcoholic liquor traffic. He seeks, by writ of *habeas corpus*, discharge from the custody of the sheriff of the county of Santa Clara.

This proceeding, among other things, involves an inquiry into the validity of that ordinance. It was passed June 28, 1906, and is called "Ordinance Number 130." The part germane to this examination is as follows:

"Section 1. It shall be and is hereby made unlawful for any person or persons either as owner, principal, agent, servant, employee or otherwise, to establish, open, keep, maintain, or carry on, or assist in establishing, opening, keeping, maintaining or carrying on, within the corporate limits of the Town of Los Gatos, any tippling house, dramshop, cellar, saloon, bar, sample room, hotel or other place where spirituous, vinous, malt or mixed liquors are sold, given away, handed out, purveyed or furnished."

Section 2 provides that such liquors may be sold for medicinal, chemical and mechanical purposes as provided therein.

Section 3 declares violations of the ordinance to be misdemeanors, and fixes a punishment therefor.

The power to pass such an ordinance is granted in section 11 of article XI of the state constitution. (*Ex parte Campbell*, 74 Cal. 20, [5 Am. St. Rep. 418, 15 Pac. 318]; *Ex parte Noble*, 96 Cal. 362, [31 Pac. 224]; *Ex parte Christensen*, 85 Cal. 208, [24 Pac. 747].) It can only be invalidated by some general law of the state with which it is in conflict.

Petitioner contends that since the cases just cited were decided, the general law has been changed by section 3366 of the Political Code, which, he argues, empowers legislative bodies of incorporated cities and towns to regulate by licensing, but not to prohibit, a business not forbidden by law. So far as towns of the sixth class are concerned, of which Los Gatos is one, this section of the Political Code was repealed by implication by the amendment of the municipal

incorporation act of March 9, 1903. (*Ex parte Jackson*, 143 Cal. 566, [77 Pac. 457].) This amendment re-enacted subdivision 10 of section 862 of the municipal incorporation act of 1883, [Stats. 1883, p. 270], under which the Campbell and Noble cases, *supra*, were decided. Those cases, then, are decisive of the validity of the ordinance questioned in this proceeding.

The sufficiency of the complaint is challenged on the ground that it does not state a public offense. The complaint charges conjunctively in the language of the ordinance that petitioner unlawfully and willfully, on or about the eighteenth day of September, 1906, did all the things prohibited by the ordinance. On *habeas corpus* this is certainly a sufficient statement of the offense intended to be charged. (*Ex parte Ruef*, 150 Cal. 665, [89 Pac. 605].) In that case it is said: "On *habeas corpus* the inquiry into the sufficiency of an indictment is limited. We think the true rule is that where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on *habeas corpus*."

The validity of the judgment is also challenged. It is asserted that it fails to state the offense of which the petitioner was convicted. The judgment recites that the petitioner was duly convicted of the crime of violating ordinance No. 130 of the town of Los Gatos, entitled, "An Ordinance relative to the Alcoholic Liquor Traffic in the said Town of Los Gatos," and adjudges "as punishment for the offense of violating Ordinance No. 130 of said Town of Los Gatos, committed as charged in the complaint as aforesaid, that defendant Mogensen pay a fine of Three hundred dollars. . . ." This judgment contains a sufficient designation of the offense charged. (*Ex parte Murray*, 43 Cal. 455.)

The petitioner is therefore remanded.

Cooper, P. J., and Hall, J., concurred.

[Civ. No. 310. Second Appellate District.—May 27, 1907.]

B. L. BRYAN, Appellant, v. J. A. GRAHAM, Respondent.

STATE LANDS—RECESSION OF LAKE—TRUTH OF AFFIDAVIT—SUBSEQUENT AGREEMENT TO SELL BEFORE CERTIFICATE.—Where it appears that at the time of an application to purchase state lands uncovered by the recession of a lake, in pursuance of the act of 1893. that the prior applicant truthfully stated in his affidavit that he desired to purchase the land "for his own use and benefit, and for the use and benefit of no other persons whatsoever," a subsequent agreement to sell the land to another person about forty days after the application and before the issuance of the certificate of purchase is not forbidden by that statute, nor by any statute of the state for the sale of state lands.

ID.—STATUTE ALLOWING SALE OF CERTIFICATE—CONSTRUCTIVE POLICY OF LAW—RESTRAINTS UPON ALIENATION.—The express statutory grant of the right to sell "certificates of purchase and all rights acquired thereunder," in section 1315 of the Political Code, cannot be construed as an expression of legislative intent that one who agreed to sell after filing his application, and before the issuance of his certificate of purchase, should lose his right to purchase. The policy of the law is to discourage restraints upon alienation.

ID.—EFFECT OF SUBSEQUENT CONTRACTS OF SALE AS EVIDENCE—CONFLICT OF EVIDENCE—SUPPORT OF FINDING.—Assuming that contracts to sell made subsequently to an application to purchase state lands, before the issuance of a certificate, would constitute any evidence tending to show the falsity of the affidavit, which would defeat the purchase, yet where it appears that there was nevertheless a conflict of testimony upon the issue as to whether or not defendant, at the time he made the prior application to purchase, did so for his own use and benefit, the finding of the court in his favor on that issue cannot be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of Kings County, and from an order denying a new trial. **M. L. Short, Judge.**

The facts are shown in the opinion of the court.

Letus N. Crowell, for Appellant.

The constitution, article XVII, section 2, expressly discourages the holding of large tracts of uncultivated and unimproved land by individuals or corporations; and the legislature

cation to purchase did so for his own use and benefit, and the finding of the court therein cannot be disturbed.

The contract to sell the land to Rubenstein was made before the certificate of purchase was issued, and it is contended that, by reason of entering into this contract prior to the issuance of this certificate, defendant lost his right to complete the purchase. In support of his contention appellant cites numerous cases, in all of which the decisions were based upon an express statutory provision either prohibiting or limiting the right of alienation or transfer; for instance, the statutes of the United States relating to homesteads require, upon the making of final proof, an affidavit that no part of such land has been alienated. (U. S. Rev. Stats., sec. 2291, [U. S. Comp. Stats. 1901, p. 1390].) So, too, there is an express prohibition of transfer or alienation prior to the issuance of the patents as to lands held under claim of pre-emption. (U. S. Rev. Stats., sec. 2263.) Our attention has not been called to any such limitation or requirement contained in the law relative to public lands of the state. The contract is with the state, and in the absence of any legislative expression, other than that contained in section 3500, Political Code, which clearly was not intended to apply to an agreement to sell, made subsequent to the filing of an application and prior to the issuance of the certificate of purchase, it cannot be held that appellant's rights are in any wise abridged by the agreement under discussion. Section 3515 of the Political Code expressly provides that "certificates of purchase, and all rights acquired thereunder, are subject to sale," etc. This express statutory grant of the right to sell the certificate cannot be construed as an expression of legislative intent that one who agreed to sell after filing his application and before the issuance of his certificate to purchase should lose his right to purchase. The policy of the law is to discourage restraints upon alienation. (*Rose v. Wood & Lumber Co.*, 73 Cal. 385, [15 Pac. 19]; *Phillips v. Carter*, 135 Cal. 604, [87 Am. St. Rep. 152, 67 Pac. 1031]; *Lamp v. Davenport*, 85 U. S. 307; *Adams v. Church*, 193 U. S. 510, [24 Sup. Ct. Rep. 512]; *Arnold v. Christy*, 4 Ariz. 19, [33 Pac. 619].)

Prior to the amendment of 1885, section 3495 of the Political Code, providing for the purchase of school lands, contained a provision requiring the affidavit of the applicant

to state therein that the purchase "was for his own use and benefit, and for the use and benefit of no other person," etc. In construing this statute—the facts being that H. had applied to purchase a section of school land under an agreement made with N. at the time of filing his application that one-half thereof was for the use and benefit of N., and which one-half thereof H. was to convey to N. as soon as purchased—the court held, in *Thompson v. Hancock*, 51 Cal. 110: "There is nothing in section three thousand four hundred and ninety-five of the Political Code which prohibits the sale of any portion of a sixteenth or thirty-sixth section, belonging to the State, to one who has contracted to convey to another a part of the land so acquired," reversing the lower court upon this point.

We find nothing in the Lake land act of 1893, under which this application was made, which prohibits the applicant from making an agreement to sell the land before the issuance to him of the certificate of purchase therein provided for.

The judgment and order are affirmed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 293. Third Appellate District.—May 27, 1907.]

H. J. CARSTENBROOK and J. D. CARSTENBROOK, Co-partners, etc., Respondents, v. W. A. WEDDERIEN and MARY J. WEDDERIEN, Appellants.

LEASE—LIEN OF LESSEE FOR ADVANCES—PREVENTION OF CROPS—ACT OF GOD—RECOVERY BACK OF ADVANCES.—Where, by the terms of a lease, the lessees were to farm the land leased for crops of grain and hay, and to make a specified advance to the lessors, and thereafter a monthly sum on demand, and all advances made were to be a lien on the lessors' share of the crops with interest when harvested, and where, after using all possible endeavor to raise crops thereon, the crops were prevented and wholly destroyed by the act of God, through the agency of floods, the lessees were not bound to make any further advances on demand, and were entitled before the expiration of the lease to sue to recover back the amount of advances made with interest.

ID.—SUFFICIENCY OF FINDINGS—PASTURAGE OF STOCK—COUNTERCLAIM BY LESSORS.—*Held*, that the findings for the plaintiffs sufficiently cover all of the material issues raised by the pleadings; and when the court found that no crop of hay could be raised or cut upon the land, and that, after the flood, a very small quantity of grass grew thereon, mixed with weeds, on which sheep and cattle could be and were pastured by plaintiffs for a limited time, the plaintiffs were entitled to such pasturage, and findings that plaintiffs were entitled thereto, and that defendants take nothing by their counterclaim for the alleged value thereof, sufficiently respond to the issues raised by the counterclaim.

APPEAL from a judgment of the Superior Court of Yuba County, and from an order denying a new trial. Eugene P. McDaniel, Judge.

The facts are stated in the opinion of the court.

W. S. Johnson, and W. H. Carlin, for Appellants.

M. T. Brittan, and J. E. Ebert, for Respondents.

HART, J.—This action is brought by plaintiffs to recover the sum of \$591, together with interest thereon at the rate of eight per cent per annum, alleged to have been loaned and advanced to defendants under and by virtue of the terms of a certain written agreement of lease entered into between the parties, involving the leasing of certain lands to plaintiffs by defendants. A jury was waived by the parties and the case tried by the court. Plaintiffs were awarded judgment for the sum of \$659.86, which includes the principal sum sued for and interest in the sum of \$68.86. Defendants take this appeal from said judgment and an order denying their motion for a new trial.

By the terms of the said written agreement or lease, which was executed by the parties on the twenty-first day of January, 1904, the defendants leased to the plaintiffs certain real property, situated in Yuba county, said lease to take effect on and from the said date of its execution and to continue in force until and including the twenty-eighth day of September, 1904. It was provided in the lease that the plaintiffs should have the option, upon the expiration of the term thus expressly agreed upon, of extending the term of their

lease of said lands for a further period of four years. The lease is made a part of the complaint and is set out *in hæc verba* in the findings, and so much thereof as may be necessary to an understanding of the issues presented by the pleadings reads as follows:

"Upon the following terms and conditions, to wit, said second parties will at all proper times and seasons during the term of this lease, and according to the terms of good husbandry practiced in the neighborhood, crop said lands and premises to grain and hay and such other crops as they shall, in their sound discretion, deem advisable; that they will carefully plant, care for, protect and harvest all of said crops without any expense to said first parties except for sacks, as hereinafter mentioned, and will deliver to said first parties, or their order, within a reasonable time after said crops shall have been gathered and harvested, subject to the lien for advancements made hereunder and to be made hereunder by said second parties to said first parties, as hereinafter mentioned, at such place as said first parties shall designate in the city of Marysville, one-third of all of said crops of grain, said first parties to furnish at their own expense sufficient sacks to contain their rental or share of one-third of all crops of grain grown and harvested upon said lands under the terms of this lease; and said second parties will further deliver to said first parties, properly stacked on said premises, one-third of all hay grown and cut upon said premises under the terms of this lease.

"Said second parties hereby covenant and agree to pay to said first parties, at the date of the execution of this lease, the sum of two hundred and thirteen dollars (\$213.00), and upon the request and demand of said first parties the further sum of fifty-four dollars (\$54.00) on the first day of each and every month commencing with the first day of February, 1904, during the period of this lease, that is, up to and including the twenty-eighth day of September, 1904, and the further sum of fifty-four dollars (\$54.00), on the like request and demand of said first parties, on the first day of each and first day of September, 1908, if said period, or every month thereafter, up to and including the term of said lease, be continued and extended to September, 1908, as hereinabove provided. Said sum of \$213.00 and said sum of \$54.00 to be paid monthly as herein specified, shall be deducted with in-

terest as herein specified, by said second parties, when paid, from the one-third share of said first parties in the crops raised under the terms of this lease, and shall bear interest from the date of their several payments at the rate of eight (8) per cent per annum, and said sum with interest as aforesaid shall be and constitute a lien on said one-third portion of said crops reserved herein as and for rental for said first parties, in favor of said second parties, until the same, together with interest as aforesaid, be repaid by said first parties to said second parties, and should the total of said advancements, together with interest as aforesaid, in any season, exceed said lessors' (said first parties) share in the entire crops for said season, then in such event said first parties shall pay to said second parties the excess thereof received by them from said second parties.

"It is further agreed by and between the parties hereto that said advancements made and to be made hereunder by said second parties to said first parties, together with interest as aforesaid, shall be repaid by said first parties to said second parties at the harvest of said crops, in gold coin of the United States of America."

The complaint is verified. The answer admits that the plaintiffs paid to the defendants the sum of \$591, but specifically denies all the other material averments of the complaint, and sets up a counterclaim upon a *quantum valebat*, for the sum of \$1,000, alleged as the reasonable value of the use of the leased lands for the purposes of pasturage, to which use, it is alleged, it was converted by plaintiffs, said pasturage being, it is claimed, the sole and exclusive property of defendants.

It is insisted that the judgment should be reversed for two reasons: "1. Because the demands sued upon were not due when the action was commenced; 2. Because the findings do not cover all the material issues raised by the pleadings."

The action was commenced on the eighth day of August, 1904. A demurrer was sustained to the original complaint, and thereafter and on the sixth day of February, 1905, plaintiff filed an amended complaint which (a demurrer thereto having been overruled) tendered the issues of fact upon which the cause was tried. The court found from the evidence "that, pursuant to the terms of said agreement, said plaintiffs did, at the proper time, in the year 1904, and in accord-

ance with the terms of good husbandry as practiced in the neighborhood in which said lands are situated, carefully crop and plant said lands and premises to grain and hay, and did carefully care for and protect said crops during the said year 1904, and that thereafter and during the said year of 1904, and before the time for harvesting the said crops, the whole of said crops were totally destroyed by an act of God and without any fault or neglect of said plaintiffs, or either of them, and as a result thereof there were no crops, or any crop, to harvest upon said lands and premises described in said agreement during said year of 1904." The court was fully warranted in making this finding from the evidence received. The plaintiffs testified that, having entered into the possession of the lands referred to in the lease between the 10th and 15th of February, 1904, they at once proceeded to plow the arable or tillable portions thereof, preparatory to seeding and cultivating the same in obedience to the covenants and conditions of the lease. The property, or the "ranch," as in common vernacular it is designated, embraces some three hundred and ninety-three acres of land, of which two hundred and five acres are "farming" lands, or lands adapted to and suitable for the cultivation of cereals. Approximately one hundred and forty acres of the land were plowed, the balance being too wet to undergo that process to any practical purpose. A short time thereafter heavy rains came, the water in the Feather river, on which the lands are situated, rose to such an extent as to overflow its banks and the flood waters inundated a large part of the land, the same remaining thereon so that the land could not be utilized for farming purposes for a long period of time. The plaintiff H. J. Carstenbrook testified: "Sometime in May I sent my teams there again and summer-fallowed eighty-five acres, on the north side of the road, and also a piece on the south side that had been winter plowed. All told, I replowed about one hundred and fifteen acres during that year after I had entered into the lease. I made two plowings that year on the place. After the first plowing, I did not sow the piece on the south side of the house, next to the levee, because I could not get on it, because of the water on it. The other part I had just seeded to barley, when the water came up on it. This was about seventy acres. There were about eighty-five acres in the whole piece, but I did not seed ten or fifteen acres of it be-

cause it was too wet. About eighty-five acres I plowed the second time. The portion of the land north of the house, about eighty-five acres, I seeded to barley twice and the water came up and drowned out both times. The water came up the second time about the 28th of March and remained over it fully three weeks and probably longer, and the ranch was not at any time afterward in such condition that it could have been cropped." This witness also testified to having had twenty-two years' experience in the business of farming in Sutter and Yuba counties. He stated that after the water had finally subsided and receded from the land there was nothing left "but a water hole," and that it was not possible under the conditions then existing to cultivate a crop of any character; that there was no volunteer crop in that year upon the one hundred and fifteen acres, which were replowed and summer-fallowed; that the vegetation on the land after the floods was not such as could be made into good hay, and that, therefore, he turned about two hundred and eighty-eight head of sheep and eight or nine head of other live stock upon the land, and thus, from the latter part of June or the 1st of July to a short time before the 28th of September, used said land "off and on" for pasturage purposes. He testified that he and his coplaintiff had under lease at the time an adjoining farm, on which they also pastured their sheep and other cattle, alternately running them on the land leased from defendants and then on the adjoining land mentioned. The other plaintiff, J. D. Carstenbrook, corroborated the testimony thus given by his partner and coplaintiff as to the unfavorable conditions with which they were confronted in an effort to cultivate the land in accordance with the terms of the lease and their failure to do so for the reasons stated by the first-named witness, and also upon the point that the grass or vegetation on the land after the flood waters had receded and it was too late to do anything in the way of seeding the land in wheat and barley or either was unfit to be profitably mown for hay. Some five or six other witnesses—farmers residing and who had for many years lived and farmed in the neighborhood of the land in question—gave testimony corroborative of that given by plaintiffs. All of them testified that plaintiffs, by the exercise of the most prudent husbandry, did their utmost to cultivate and grow suitable crops upon the land, but failed because of the intervention of unfavorable

climatic conditions; that, under the circumstances, it was impossible to crop the land; that there grew upon the land after the water from the overflow of the river had disappeared "dog-fennel" and other weeds unfit even for the purposes of pasturage; that, while there was a small quantity of grass growing on the land upon which sheep and other cattle could thrive for a very limited time, it was measurably insignificant and in consequence, for purposes of hay, not worth its cutting. In fact, the testimony of these witnesses was uniform upon the point that a crop of hay could not have been cut from the land after the recession of the waters of the overflow. From the conditions existing and as thus briefly described, it was manifestly impossible to have cultivated and advanced to a state of fruition any kind of a crop upon the land, and, therefore, it irresistibly followed that the terms upon which the plaintiffs took possession thereof under the lease could not be by them met and carried out. These conditions, as the court found and as the evidence conclusively demonstrates, were not brought about through the fault or the negligence or default of the plaintiffs, but were the consequences of the course of nature and resulting circumstances, to repel, overcome or control which is, of course, beyond the power of any known human agencies, except, perhaps, through efficient levee fortifications, constructed to guard against overflows of the flood waters.

Under the stipulations of the lease, as will be observed, the defendants, in consideration of transferring the possession and use of their land to plaintiffs, were to receive one-third of any and all crops grown and harvested by said plaintiffs, "subject to the lien for advancements made hereunder and to be made hereunder" by said plaintiffs. The latter, under the terms of the lease, advanced to defendants, upon the execution of the instrument, the sum of \$213, and were to thereafter further advance to them on the first day of each month the sum of \$54, "commencing with the first day of February, 1904, during the period of this lease, that is, up to and including the twenty-eighth day of September, 1904," said advances to be made "upon the request and demand" of said defendants.

The contention is that the action was prematurely brought, because the plaintiffs defaulted in making the last advance

of \$54—that is, the advance which they would have been required to make upon demand of defendants if the land had been successfully farmed. In other words, the sum of \$54 not having been advanced or loaned to appellants for the month of September, no right of action accrued to respondents for the total amount already so received by defendants. The contention is, in our opinion, wholly without any reason for its support. Upon the question of the time of repayment, the agreement is in no sense obscure. It provides that said “advancements made and to be made hereunder by said second parties, together with interest as aforesaid, shall be repaid by said first parties to said second parties *at the harvest of said crops, in gold coin,*” etc. It certainly would not be attempted to be maintained that this clause of the lease means that the money should not be returned until crops had been actually harvested, and it is not so contended. The proper and the only true construction of it is that the money should be repaid at that time of the season when crops, if there were any, should be harvested, or at any other time, we think, when it could become a certainty or settled fact that it was impossible, from the inordinate quantity of water from the river overflows covering the land, to grow crops thereon. The evidence shows that it was plainly apparent to the parties to the lease, at and before the time at which crops should have been harvested upon the land had they been seeded and grown, that there was no possibility of securing crops from the land, and, in consequence, no possibility of the receipt by the defendants of the compensation to which they would have been entitled had the season been more propitious. The conditions upon which the land was leased necessarily involved returns to both parties from their investment, as it may properly be styled, as indeterminate, uncertain and problematical, as must be usual to enterprises which, like this, are required to depend, as among the prime factors essential to their prosperousness and final success, upon favorable meteorological and other conditions. Each of the parties, in other words—the defendants as well as the plaintiffs—by their written covenants, manifested, mutually, a willingness to take a chance of reaping the benefits which ordinarily attend such a venture, and of suffering together the disadvantages and losses which the interference of adventitious circumstances too often bring to it. The termination of the lease was fixed

for the latter part of September, in order, without doubt, that the entire harvesting season would thus be included in and covered by the lease, thereby giving plaintiffs full opportunity to properly gather whatever crops they might deem it the part of wisdom to grow. There is nothing in the language of the lease, reasonably construed, which bound plaintiffs to advance the \$54 a month after it became certain that there could be no possible hope or expectation of harvesting a crop of any character from the land. The moneys received by defendants from plaintiffs were, it is admitted, mere loans, to secure repayment of which it was agreed that plaintiffs should retain, until their accounts were adjusted, the share to which the defendants, by the terms of the lease, would be entitled, of any crops which might be harvested upon the land. That point or stage of the season having been reached where it must have been absolutely clear to both parties that no crop of any kind whatsoever could be gathered from the land, owing to the unfavorable conditions which existed, by what process of reasoning can it be maintained that, under the terms of the lease, interpreted agreeably to reason, the plaintiffs were in no position to sue for advances already made, because they had not made the further loan of \$54, which they would probably have been required to make in the event that the land had been successfully cropped? The lease may well be construed as obligating plaintiffs to make the loans to defendants as stipulated therein so long as there existed a prospect or hope of realizing some returns from the cultivation of the land in the manner agreed upon, and that when the time arrived that any reason for such prospect or hope ceased to exist, then the obligation to make such advances ceased to be binding or of any force. We can conceive of no reason, under a fair interpretation of the language of the lease, why the plaintiffs should have been forced, before acquiring a right to sue for moneys already loaned to defendants, to go through the form of advancing a further sum of \$54. The logic of the argument may be stated thus: "We owe you, it is true, the sum of \$590," say the defendants, "but you have no right now to sue us, nor can you ever acquire any such right until you have made the advance to us of the further sum of \$54. The reason for such further loan has, of course, ceased to exist, but we are, nevertheless, under the

strict letter of the lease, entitled to a further advance of \$54. When you have thus carried out your part of the agreement, you are then authorized to, and have the legal right, immediately thereafter to sue us, not only for the last advance made, but for the whole amount loaned to us." This, it seems to us, is the necessary effect of the argument, and the proposition is obviously a *reductio ad absurdum*.

We think the findings sufficiently respond to and include all the material issues tendered by the pleadings. The specific complaint upon this point is that the court omitted to make any finding upon the issue involved in the alleged counterclaim set up by the defendants to the effect that "during the period of the lease plaintiffs used the leased premises for pasturage purposes solely," etc., and that "the reasonable value of this pasturage was the sum of \$1,000." The findings of the court upon this question is as follows: "That said plaintiffs, under the terms of this agreement, are entitled to all of the pasturage on said land during the terms of said lease, and that said defendants take nothing by reason of their counterclaim." This finding is sufficient to cover the issue to which it relates. It appears to be clear enough to require no amplification or explanation to comprehend its meaning. The plain meaning of it is (and it can be construed as meaning nothing else) that the pasturage on the land was the property of plaintiffs, and that, therefore, the claim of defendants that it belonged exclusively to them, and that they were entitled to damages in any sum from plaintiffs for taking and using it is without any foundation in fact. The authorities cited by counsel are where no finding whatever was made upon a certain material issue raised by the pleadings, or even an attempt to make one.

The grounds upon which the motion for a new trial was based and urged here upon appeal from the order practically call only for a discussion of the questions presented on the appeal from the judgment, and which we have considered. Counsel insist that the court erred in refusing to grant the motions of defendants to dismiss the action and for judgment on the pleadings, and also in denying their motion for a nonsuit, but the questions arising thereon, as suggested, have been disposed of in the discussion of the points urged on the appeal from the judgment.

The plaintiffs were, we think, entitled to the use of the pasturage and feed growing upon the land. There is no provision in the lease reserving to the lessors the right to the pasturage, and unless such right was withheld from plaintiffs, who were tenants for years, by the terms or some covenant of the lease, the plaintiffs were acting within their rights when they grazed their stock upon the land. (Civ. Code, sec. 819; *Marshall v. Luis*, 115 Cal. 625, [47 Pac. 597].) Of course, it should be unnecessary to say that, if the lessees had succeeded in growing upon the land a crop of hay, or of barley or of wheat, worth harvesting, in point of quantity and quality, they would not have been justified in entirely appropriating the same for pasturing of their stock or otherwise, without accounting to the defendants for their share thereof. But we feel convinced from the testimony adduced at the trial that, after the disappearance of the flood waters from the land, the vegetation growing thereon which was at all capable of utilization was, even for the purposes of pasturage, of comparatively little value, and that the consequence of gathering it, if, indeed, it was in such condition as to have rendered it practicable to reap it, considering the cost and labor required to do so, would have been loss rather than profit. The evidence indisputably establishes the fact that the plaintiffs, who are experienced farmers, and who, from having been engaged in the business of farming for many years in the section of the state where the leased lands are situated, must be thoroughly familiar with the methods and requirements of successful farming in that locality, unremittingly strove to cultivate and grow crops upon the property, as they agreed to do, by the covenants of the lease. There was no sane reason why they should not have done so. They had equal concern with the defendants in the success of the venture, for their failure because of negligence or for any other reason within their control to make the business prosperous and profitable could not result otherwise, quite naturally, than to militate against their own welfare, as well as against that of the defendants.

We have carefully consulted all the authorities cited by counsel for appellants as sustaining their several contentions, and readily concede that they contain declarations of sound law, but are unable to perceive their application to the facts

presented in the case at bar. We can find no reason for disturbing the judgment or the order.

For the reasons stated in the foregoing discussion, the judgment and order appealed from are affirmed.

Burnett, J., and Chipman, P. J., concurred.

[Civ. No. 809. Second Appellate District.—May 28, 1907.]

MORRIS HURWITZ, Respondent, v. S. L. GROSS, Appellant.

ACTION FOR BREACH OF CONTRACT—SALE OF LAND—ASSUMPTION OF CHATTEL MORTGAGES—CLAIMS OF DEFENDANT—BURDEN OF PROOF—FINDINGS.—In an action to recover damages for a breach of contract by the defendant, in consideration of a sale and conveyance of land to him by the plaintiff, to assume and pay two chattel mortgages on the orange crop growing on the land conveyed and also upon plaintiff's remaining land, where the defendant by answer and cross-complaint alleged that it was agreed that the entire crop was to belong to defendant, and that the crop taken by the mortgagee was removed by plaintiff without defendant's consent, the burden of proof was upon the defendant to prove his allegations, and where he failed to do so, the court properly found against him in that regard.

ID.—SINGLE CAUSE OF ACTION—ELEMENTS OF DAMAGE—MISJOINDER NOT SHOWN.—Where the complaint counted on a cause of action for damages for breach of the contract in an aggregate sum, but divided the aggregate amount of the two chattel mortgages assumed by defendant into two elements of damage—the first, for partial failure of the consideration of the conveyance, measured by the proceeds of oranges belonging to plaintiff, which were applied toward payment of the chattel mortgages so assumed; and second, the unpaid balance necessary to clear plaintiff's remaining land from the lien of the mortgages—it states but one cause of action for breach of the contract to plaintiff's injury, and shows no misjoinder of causes of action.

ID.—UNCERTAINTY OR AMBIGUITY NOT MISLEADING.—Where there is no uncertainty or ambiguity which could mislead the defendant in pleading to the complaint, a demurrer on that ground was properly overruled.

ID.—PARTIES—MORTGAGEE.—The mortgagee was neither a necessary nor a proper party to the action for breach of the contract made

by the defendant with the plaintiff to assume and pay off the mortgages.

ID.—ESTOPPEL OF DEFENDANT—ASSUMPTION OF MORTGAGE MADE BY THIRD PARTY—DIRECTION TO MORTGAGEE.—Where the larger crop mortgage was executed by a third party, and constituted a lien on all of plaintiff's crops, its assumption by defendant, in consideration of the conveyance of land to him, estopped him from questioning whether plaintiff's obligation to pay it was a legal or moral one; and having directed the mortgagee to apply the proceeds of plaintiff's oranges to its payment, he is estopped to deny the validity and enforceability of the obligation against plaintiff's demand for a repayment of the money so applied.

ID.—CONSTRUCTION OF CONTRACT—EVIDENCE, PURPOSE AND CIRCUMSTANCES.—In ascertaining the meaning of the language of the contract, evidence showing its purpose or object, and the circumstances surrounding its execution, was admissible, and must be taken into consideration in its construction.

ID.—EVIDENCE—EXHIBITS AND RECORDS OF CORPORATION MORTGAGEE—IDENTIFICATION.—Exhibits, copies of account sales check sheets of the corporation mortgagee showing particulars of oranges received and sold by it for account of plaintiff, also, a "ledger sheet" and "weigher's receiving account slip," all of which were identified as original papers and records of the corporation by their proper custodian, were admissible in evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. W. P. James, Judge.

The facts are stated in the opinion of the court.

Herbert Cutler Brown, and George H. Moore, for Appellant.

Charles L. Batcheller, and Thomas C. Ridgway, for Respondent.

TAGGART, J.—This is an action to recover damages for failure to perform an agreement to assume payment of two certain chattel mortgages. Judgment was for plaintiff, and defendant appeals from the judgment and an order denying his motion for a new trial.

Plaintiff, on the nineteenth day of January, 1905, was the owner of four parcels of land (designated in his complaint

as one, two, three and four, respectively), located in Los Angeles county, upon which, or portions of which, there were growing crops. Against these lands and the crops thereon there subsisted four mortgages: two against the lands for \$13,000 and \$5,000, respectively, and two against the growing crops, dated April 29, 1904, and August 15, 1904, given to secure the payment of promissory notes for the sum of \$2,000 and \$700, respectively, and each due one day after date. These crop mortgages were held by the California Citrus Union, which, at the request of plaintiff, picked and removed of said mortgaged crops, before January 19, 1905, oranges belonging to plaintiff of the net value of \$1,004.47, as determined by the subsequent sales thereof made by said Citrus Union.

On January 19, 1905, plaintiff sold to defendant parcels designated as one and two, for a consideration expressed in the "escrow instructions" as follows: "We are to pay Mr. Hurwitz \$2300 twenty-three hundred for above property and assume \$13000.00 Mtg. or Tr. deed & all Int. due, & assume \$5000 Mtg. or Tr. deed & Int. from Jan. 20th 05 & assume \$2700 Chat. Mtg. & all Int. from Jan. 20, -05. Hurwitz to show statements from last 2 mtgee's that said int. is paid to said date." On the same day plaintiff, in execution of said agreement, made a conveyance to defendant of parcels 1 and 2, wherein was contained the following clause: "Subject to all incumbrances now of record against said property, all of which incumbrances the parties of the second part assume and agree to pay." Defendant complied with the other terms of the "escrow," but failed to pay the chattel mortgages and free parcels 3 and 4 from the lien thereof, and notified the Citrus Union to apply the proceeds of sales of said oranges, picked prior to January 19th, to the payment of the indebtedness secured by said mortgages, which was done.

The complaint counts on a cause of action for damages for breach of contract, and fixes the amount of such damages at \$2,700—the aggregate of the principal sums of said two chattel mortgages, which damages are divided into two elements: The first (\$1,213), for partial failure of consideration for the conveyance made by plaintiff to defendant, being measured by the proceeds of sales of oranges belonging to plaintiff, applied to the payment of the chattel mortgages by the Citrus Union after defendant had assumed the same; and, second

(\$1,487), the unpaid balance necessary to clear said third and fourth parcels of land, retained by plaintiff, from the lien of said chattel mortgages.

By answer and cross-complaint defendant claimed that plaintiff agreed that the entire orange crop for the year 1904 should pass by the conveyance mentioned in the complaint, and that plaintiff removed the portion of said orange crop so taken by the Citrus Union without defendant's knowledge or consent. No evidence was introduced on this issue, and the court properly found against the contention of defendant in this regard. The burden was upon defendant to establish his allegations.

While there are two elements of damage specially alleged in the complaint, it states but one breach of contract, and but one cause of action. This is sufficiently stated. It appears from the allegations of the complaint that defendant agreed to clear parcels 3 and 4 from the liens of the chattel mortgages, and to assume the payment thereof, that there was a sufficient consideration for such promise or agreement, that he failed to perform his agreement, and that plaintiff was injured by reason of such failure. The cause of action must not be confused with the remedy or relief sought. (*Frost v. Witter*, 132 Cal. 426, [84 Am. St. Rep. 53, 64 Pac. 705].) This view of the complaint disposes of the errors complained of in the rulings of the trial court upon defendant's demurrer to the complaint on the ground of misjoinder, and the motions to strike out and to sever and separately state the two alleged causes of action which it was contended were misjoined in the complaint. The special demurrers based upon alleged uncertainty of statement of ownership and other allegations as to the oranges taken by the Citrus Union and applied to the payment of the indebtedness secured by the chattel mortgages were properly overruled. There was unnecessary detail, perhaps, in the allegations relating to this element of damage, but no uncertainty or ambiguity that could mislead the defendant in pleading to the complaint.

The Citrus Union was neither a necessary nor proper party to the action. It had a right under its contract to apply the proceeds of the orange sales to the indebtedness due it, and plaintiff could not recover the money back merely because he had contracted with defendant to pay the whole of the mortgages, and the latter had failed to do so. Plaintiff's only right

of action was against defendant for the breach of his contract.

The crop mortgage for \$2,000 given by Gore constituted a lien upon all of plaintiff's crops, and its assumption by defendant was made a part of the consideration for the conveyance to him. He cannot now question whether plaintiff's obligation to pay it was a legal or moral one. (*Hartwig v. Clark*, 138 Cal. 668, [72 Pac. 149].) Plaintiff treated it as a binding obligation, and so did defendant when he directed the Citrus Union to apply the proceeds of sales of plaintiff's oranges to its payment, and also later, when he paid the balance due thereon to the Citrus Union. Having directed the application of plaintiff's money to its payment, he is estopped to deny the validity and enforceability of the obligation against plaintiff's demand for a repayment of the money so applied.

The construction of the contract by the trial court was correct. In ascertaining what is meant by the language used in a written instrument, the object in view and the circumstances surrounding its execution must be taken into consideration. (*Neale v. Morrow*, 150 Cal. 414, [88 Pac. 815].) Taking the contract here under consideration by the four corners, and reading it with the eyes of those who made it, by the light, and under the circumstances, which surrounded its execution (*Walsh v. Hill*, 38 Cal. 487), we see that plaintiff had four parcels of land encumbered with mortgages; that defendant agreed, in consideration of the conveyance to him of two of the parcels, to assume the payment of all the liens on the four parcels and pay the plaintiff \$2,300. The consideration to plaintiff then was the clearing of parcels 3 and 4 from the mortgage liens and the \$2,300 cash in hand. The oranges severed from the land prior to the sale were the property of plaintiff. The amount of the crop mortgages, ascertained on the face of the agreement, was \$2,700. This amount was fixed as the liability of defendant, by the contract, and the plaintiff was required to pay the interest thereon to the date of sale. This construction of the "escrow" and the clause in the conveyance justifies the conclusions reached by the trial court. The evidence introduced warrants the findings of the court, and justified it in denying the defendant's motion for a nonsuit.

A careful consideration of the errors assigned in connection with the admission of evidence discloses no prejudicial error.

A number of exhibits, copies of account sales check sheets of the California Citrus Union showing particulars of oranges received from, and sold for and on account of, M. Hurwitz, were admitted in evidence over the objections of defendant. These were identified by the employees of the company in whose custody they were, who testified that they were the original sheets received from the district agent at the Covina office, the place at which the oranges were received and from which the shipments purported to have been made; that the witness did not make the entries; they were not made in his presence, and that he had no information as to the knowledge of the district agent who made them. The district agent at Covina testified that the transactions took place during his predecessor's incumbency; that he knew nothing of the transactions to which they referred except as to the custom of making such records; that he received them from his predecessor as records of the office; that he was acquainted with the agent in whose handwriting they were and with his handwriting, and that they were in his handwriting.

A "ledger sheet" and "Weigher's Receiving Account Slip" were also admitted in evidence over the objections of defendant. These were identified by the chief clerk in the office of the Citrus Union as original records from that office. He also stated that the bookkeeper who kept the book showing the account of Mr. Hurwitz was no longer in the employ of the company, and when last heard from was in Arizona. The witness testified that the "ledger sheet" introduced was the original card showing the only account kept with the chattel mortgages in question, and showed all the entries in relation thereto and all the credits given thereon.

A number of questions were asked of these witnesses as to the matters displayed upon the records so introduced, all of which were objected to by defendant, and his objections were overruled, the trial judge stating in explanation of his rulings in this regard at one time that it might be understood that the witness made none of the entries, had no knowledge of the facts about which he was testifying, but that he had received the instruments, whose contents he was repeating, as records of the office which it was the custom of the company to keep, in the custody of the employee filling the position

which the testifying witness did. The court, by its remarks in some instances, expressly distinguished between the statement of a fact known to the witness and the statement of matters appearing on the records introduced, and permitted the witness to state the latter. In one instance at least, where the question called for that which it was apparent from the question the witness could only answer from the record the court directed the witness: "He can state whether there is any record of any such payment, regardless of whether they existed in fact."

Questions relating to the correctness and accuracy of books sought to be introduced in evidence have generally arisen in cases where the books are introduced on behalf of the party keeping them, and are in the nature of self-prepared and self-serving declarations. They were permitted to be introduced at common law only because the party could not testify in his own behalf, and when parties to an action were first permitted to testify, it was held by some of the courts that the books of a party could no longer be admitted in evidence. (*Roche v. Ware*, 71 Cal. 377, [60 Am. Rep. 539, 12 Pac. 284].) Books of account so belonging to the parties to the litigation are said to be in the nature of secondary or supplementary evidence of the facts therein stated (*Bushnell v. Simpson*, 119 Cal. 661, [51 Pac. 1080]), but have been held admissible, when preliminary proof has been made, to support a claim against the estate of a deceased person where the claimant cannot be a witness to testify to his own claim. (*Cowdery v. McChesney*, 124 Cal. 363, [57 Pac. 221]; *City Sav. Bank v. Enos*, 135 Cal. 172, [67 Pac. 52].) The question of who may make the preliminary proof and the limitations upon the parties' testimony in such cases appears to be still open to discussion in this state. (*Stuart v. Lord*, 138 Cal. 677, [72 Pac. 142].) In *White v. Whitney*, 82 Cal. 166, [22 Pac. 1138], the rule is adopted from Wharton on Evidence, that "a tradesman's book of original entries is, in most jurisdictions, received in evidence as *prima facie* proof, when supported by the tradesman's oath," and cases in this state are cited which, it is said, sanction, although they do not expressly declare, this rule.

We think, however, that a different rule should be applied to the books here under consideration from that which is applied to the books of a party to the litigation producing them

to serve his own purposes and aid his own claim. The exhibits here admitted are the records of the business transactions of a corporation required by law to be kept by all corporations for profit. (Civ. Code, sec. 377.) They constitute the "memory" of the transactions of the corporations. Having been produced as the regularly kept and original books of the corporation, identified as such by their proper custodians, they are admissible in evidence. (*City Sav. Bank v. Enos*, 135 Cal. 172, [67 Pac. 52].) The exhibits were, therefore, entitled to be admitted upon the preliminary proof given.

The practice followed by the trial judge in permitting the witnesses who were merely custodians of the record, without pretense of knowledge as to the transactions recorded, to read from the record in response to direct questions as to the fact, is one much pursued by some trial judges where the case is tried without a jury. Such a practice is open to abuse, and should be pursued with great caution. Deductions made by bookkeepers greatly aid the court and materially reduce its labors, but in the statement of the record as a fact, if not confined to a literal reading of the record, the witness' own inferences are liable to creep in and a wrong interpretation of the writing be thus had.

A careful examination of the record discloses no statements of witnesses so testifying to what the record contained which do not appear in the exhibits, except, perhaps, one or two answers to questions as to what the books did *not* show, which were competent and relevant questions in themselves. The exhibits being *prima facie* evidence, and no attack being made upon their correctness, we cannot see that appellant was prejudiced by the rulings of the court in permitting these questions to be asked and answers to be given. All the evidence relating to the Citrus Union's books merely tended to increase or diminish one branch of the damage alleged by a corresponding decrease or increase of the other branch. Two thousand seven hundred dollars were necessary to release tracts 3 and 4 from the lien of the chattel mortgages. To the extent that plaintiff's oranges were used to pay this sum he was entitled to recover from defendant, and to the extent that the defendant failed to pay the mortgages plaintiff was entitled to compel him to do so or pay the amount necessary for this purpose. It was immaterial to defendant upon

which branch he was required to pay, and the books of the Citrus Union only determined into which pocket of plaintiff the money should go, to reimburse him for his oranges taken or to clear his land from the lien against it. Conceding that some, or all, of the evidence relating to the books of the Citrus Union was improperly admitted, the defendant was not prejudiced thereby.

No error appearing in the record, the judgment and order appealed from are affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 27, 1907.

[Civ. No. 362. Second Appellate District.—May 23, 1907.]

JOHN L. BOHN, Administrator of Estate of PETER BOHN,
Deceased, Appellant, v. PACIFIC ELECTRIC RAIL-
WAY CO., Respondent.

ACTION FOR DEATH—NONSUIT AT CLOSE OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—CONSTITUTIONAL LAW—JURY TRIAL.—In an action for death, where it clearly appeared at the close of all of the evidence for both parties that the deceased was guilty of contributory negligence, and that if the case had been submitted to the jury it would be the duty of the court to set aside a verdict for the plaintiff, a nonsuit was properly granted. Such action of the court was not violative of the constitutional right of trial by jury.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Kendrick, Knott & Ardis, for Appellant.

Bicknell, Gibson, Trask, Dunn & Crutcher, and Norman S. Sterry, for Respondent.

SHAW, J.—The defendant owned and operated an electric railway line running from the city of Los Angeles through the town of Compton to Long Beach. It appears without conflict in the evidence that on September 12, 1904, the defendant was running a car at the usual rate of speed north on Wilmington street in said town of Compton, and when approaching Main street, which crosses said Wilmington street, one Peter Bohn appeared in a vehicle, to which was hitched a team of horses which he was driving south along said Wilmington street parallel with and on the west side of defendant's tracks. The car, running at a speed of fifteen to twenty miles per hour, which was not in excess of the usual speed, was approaching the crossing at which there was a sign, "Railroad, Look out for the Cars," and its approach was in plain view of said Peter Bohn; the usual signal whistle was given and the gong was kept going. There was nothing in Bohn's manner which indicated that he contemplated trying to cross the track until the car had reached a point about sixty to ninety feet from the crossing, when he suddenly turned his horses upon the track, with the result that a collision occurred, in which said Peter Bohn was killed. His administrator sues for damages.

At the close of plaintiff's evidence defendant moved for a nonsuit, which was denied. Defendant then introduced its evidence and renewed its motion for a nonsuit, which motion the court granted, and judgment was entered for defendant. Plaintiff's motion for a new trial was denied, and he appeals from that order.

The error assigned is the order granting the motion for nonsuit.

It is not claimed that the deceased was not guilty of gross negligence, as he clearly was, but it is contended that the motorneer in charge of said car saw the deceased upon the track in time to have stopped the car, and by the exercise of ordinary care he could have stopped the car after he saw the danger to which said deceased was exposed by reason of his position.

Appellant contends that the action of the court in granting the motion was in violation of section 2101 of the Code of Civil Procedure, and section 7, article I of the constitution of this state, which provides: "The right of trial by jury shall be secured to all, and remain inviolate." Like constitu-

tional provisions are contained in the organic law of every state in the Union; yet, notwithstanding this fact, the courts of last resort recognize the right of the trial judge in proper cases to direct a verdict in favor of the plaintiff, or to grant a nonsuit. The practice has from the earliest date in the history of this state received judicial sanction. In *Ringgold v. Haven*, 1 Cal. 115, the court says: "If, therefore, upon a given state of facts, a court would be obliged to set aside a verdict of the jury as against the evidence, we see no reason or propriety in submitting such facts to them for their consideration. When their determination will be a nullity, why compel them to deliberate? Such a course is neither creditable to the law, nor complimentary to the jury." This language was cited with approval in *Mateer v. Brown*, 1 Cal. 221, [52 Am. Dec. 303]; and again in *Geary v. Simmons*, 39 Cal. 224, the court says: "A court is justified in granting defendant's motion for nonsuit, after the evidence on both sides has been heard, in a case where, if the motion had been denied and a verdict found for plaintiff, it would have been set aside as not supported by, but contrary to, the evidence." In *Fox v. Southern Pacific Co.*, 95 Cal. 234, [30 Pac. 384], a second motion for nonsuit was made and granted after all the evidence was in. In reviewing this ruling the court says: "Practically, therefore, the real question in the case at bar is whether or not the court abused its discretion in holding that the evidence was insufficient to support the verdict; and it is clear to us, from an examination of the evidence, that this question must be answered in the negative." To the same effect is *Vanderford v. Foster*, 65 Cal. 49, [2 Pac. 736], and *Fagundes v. Central Pacific R. R. Co.*, 79 Cal. 97, [21 Pac. 437]. In *Estate of Morey*, 147 Cal. 495, [82 Pac. 57], the court in discussing a similar question says: "With regard to the granting of a motion for nonsuit made at the close of the evidence for plaintiff and defendant, the rule seems to be well established that the trial court has discretion, and that it is not error to grant the motion where, upon all the evidence, it is clear that if a jury should bring in a verdict against the defendant it would be the duty of the court to set it aside and order a new trial." To the same effect is *Estate of Dole*, 147 Cal. 188, [81 Pac. 534]. Nor is the practice confined to this state. Quoting from *Cooper v. Waldron*, 50 Me. 81: "When in any case it is clear that upon the evi-

dence verdict for the plaintiff cannot stand, that in the end judgment must be rendered for the defendant, what good reason can be assigned for submitting the case to the jury? If their verdict is right, nothing is gained; and if it should happen to be wrong, it must be set aside. To withhold a case from the jury is no greater interference than to set aside their verdict. To set aside their verdict impliedly impeaches either their intelligence or their integrity, and tends to lessen public confidence in the usefulness of the institution. . . . If the presiding judge is of the opinion that the facts admitted or clearly established are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff or direct the jury to find a verdict for the defendant. The better course is for the judge to nonsuit the plaintiff, for it is idle to submit to the jury a question that can be answered in only one way." And in *Reed v. Inhabitants*, 8 Allen, 522, the court held: "Where the whole evidence introduced by the plaintiff, if believed by the jury, is so insufficient to support a verdict that the court would not permit one to stand, it is the duty of the court to instruct the jury, as a matter of law, that there is not sufficient evidence to warrant a verdict for plaintiff."

"Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." (*Byrd v. Southern Express Co.*, 139 N. C. 273, [51 S. E. 851].)

"There is in every case a preliminary question, which is one of law, namely: Whether there is any evidence upon which the jury could properly find the verdict for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit, if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant." The above is the English rule as expressed by Mr. Justice Willes in *Rider v. Wombell*, L. R. 4 Ex. 38, and the same rule obtains in practically all of the states of the Union. Measured by this rule, the question before us is one solely of an abuse of discretion by the trial court; and upon the evidence as dis-

closed by the record we are firmly convinced there was no abuse of discretion on the part of the court in making the order of which appellant complains. The evidence in support of the allegation that the motorman operating the car could, by the exercise of ordinary care, have stopped the car after he had become aware of the dangerous position occupied by deceased, is not only meager, but of a character entitling it to little, if any, weight. Had the case been submitted to the jury and a verdict for plaintiff followed, it is clear that it would have been the duty of the court to have set the same aside and ordered a new trial. Under such conditions, no good purpose could be subserved by submitting the case to the jury. The same object is accomplished by a shorter legal route in ordering a nonsuit. As said in *Estate of Morey*, 147 Cal. 495, [82 Pac. 57], the practice is only justified in very clear cases, and where there is even an approach to a substantial conflict in the evidence, the issue should be left with the jury.

The right of the court to set aside a verdict which is unwarranted by the evidence is beyond question. We are unable to perceive any constitutional distinction between the exercise of such right and the right to order a nonsuit in a proper case at the close of the evidence. There was no abuse of discretion in granting the motion for nonsuit, and the order denying a new trial is affirmed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 342. Second Appellate District.—May 28, 1907.]

D. F. DONEGAN, Respondent, v. H. R. HOUSTON, and
D. C. WILSON, Appellants.

ASSUMPSIT—WORK AND LABOR DONE—EXECUTED CONTRACT—PLEADING.—A complaint to recover for work and labor done in grading and excavating for the defendants, within two years, for which they agreed to pay to the plaintiff a specified sum, is in effect an *indebitatus assumpsit* count at common law. Such pleading is allowable under our code; and its use carries with it the general rule applicable to such counts.

ID.—OMISSION OF USUAL AVERMENTS—IMPLIED CONSIDERATION AND PROMISE.—Though the complaint lacks the ordinary averments of indebtedness, and that the services were rendered at defendant's request, yet these averments are unnecessary when the consideration as well as the promise are implied from the nature of the transaction declared upon.

ID.—DISTINCT DEBTS UNDER DIFFERENT CONTRACTS.—Under an *indebitatus assumpsit* count, several distinct debts due in respect of different contracts not under seal of the same or different nature, as demands for work, and debts for goods, money lent, etc., might always be included in one count of this description, and whatever is due may be recovered thereunder. It is not necessary to declare specially, however special the agreement may have been, when plaintiff has performed the terms and the remuneration was to be in money.

ID.—EXPRESS AND IMPLIED CONTRACTS—GRADING AND EXTRA WORK—ACCOUNTS STATED—ITEMS.—The plaintiff may recover in one count under an executed express contract for grading completed, and also under an implied contract for extra work, as together constituting the whole indebtedness due, and where an account was stated for the whole indebtedness, the law implies a promise to pay it. It was not necessary to plead any of the items from which the result was obtained, the only remedy of the defendants being to demand a bill of particulars under section 454 of the Code of Civil Procedure.

ID.—PLEADING—ISSUE UNDER IMPLIED AVERMENT—WAIVER OF ENGINEER'S CERTIFICATE—UNJUST AND FRAUDULENT DETENTION—PERSONAL QUARREL.—The issue as to whether there was a waiver of the engineer's certificate required of the plaintiff was properly tried by the court, under the implied allegation that the contract was fully executed and performed, and that nothing remained but to pay the money agreed. The plaintiff might, without express pleading, prove that the engineer's certificate was unjustly and fraudulently detained, without warrant, owing to a personal quarrel.

ID.—FINDINGS WITHIN PLEADINGS—SUPPORT BY EVIDENCE.—*Held*, that all the findings for plaintiff are within the pleadings, and are supported by sufficient evidence. The weight of the evidence will not be considered where there is a substantial conflict therein.

ID.—OBJECTIONS TO COMPLAINT CURED BY ISSUES UNDER DEFENDANT'S PLEADINGS.—Where all of the issues which it is claimed the complaint should have tendered were set forth by the answer, counterclaim and cross-complaint of the defendants and issues joined thereon by plaintiff's answer thereto, any objections to the insufficiency of the complaint are thereby waived and cured; and where the case was tried and findings made for plaintiffs upon the issues tendered by defendant's pleadings, the judgment cannot be

reversed because of the objections made to the complaint, even if it be conceded that they were tenable.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Russ Avery, for Appellants.

H. L. Dunnigan, Haas, Garret & Dunnigan, and Charles H. McFarland, for Respondent.

TAGGART, J.—This is an action to recover for grading and excavating done by plaintiff for defendants on fifteen acres of land in the city of Los Angeles. Judgment was for plaintiff and defendants appeal from the judgment and order denying a new trial.

The complaint alleges the cause of action in the following language: "Now comes the plaintiff and says that within the last two years past, he did grading and excavating for the defendants, for which they agreed to pay him the sum of six thousand one hundred seventy-three dollars."

By answer, counterclaim and cross-complaint defendants set out a special contract in writing between plaintiff and defendants, under which, it is alleged, all the grading and excavating involved in this action was done by plaintiff. By the terms of this contract the grading was to be done to the satisfaction of one S. O. Wood, civil engineer, and be testified to by his certificate in writing. It is alleged that plaintiff failed to perform his part of the contract in time, or at all, was unable to procure the certificate of the engineer, and abandoned the work and failed to complete it; that defendants were compelled to expend certain sums in finishing portions of the work, and suffered certain alleged damages by reason of the delay and failure of plaintiff to complete the grading according to contract.

The plaintiff's answer to the latter pleadings denies each and all the allegations mentioned, and the findings of the court expressly, or in effect, negative them all. The court also finds that plaintiff performed work in grading and ex-

cavating for the defendants, and that they agreed to pay him therefor as alleged in the complaint. That all the work done by plaintiff was done on the property described in defendants' pleadings, but that it was not all done under the contract pleaded therein. The court does not segregate the amount due for work under the contract from that due for other work, but finds there is now due to plaintiff from defendants \$2,019 with interest, and the judgment is for that amount.

Appellants present their case on appeal as if the plaintiff had brought his action on the contract, and attempted to introduce evidence to excuse his failure to secure the certificate from the engineer without an allegation in his pleading to support it. They also contend that for this same reason the pleading does not support the finding of the court that "it is not true that the grading was not done in a workmanlike manner and to the satisfaction of the engineer or defendants or either of them" (following the language of the allegation in defendants' pleadings).

It is further contended that the extra work testified to by plaintiff should have been excluded from the judgment because it could only be supported by a pleading counting on a *quantum meruit*, and there was and is no such count in the complaint. No attack is made upon the sufficiency of the complaint, by demurrer or otherwise, and no objections were taken to the testimony introduced and no exceptions preserved to the improper admission or exclusion of evidence.

There are seventeen specifications of insufficiency of the evidence to justify the decision, nine of errors of law, occurring during the trial, assigned (all of which relate to the findings of the court), and eight particulars in which the decision is said to be against law. Most, if not all, these specifications, errors and particulars pass out of consideration upon ascertaining and determining the character of plaintiff's action, and applying the rule that this court will not look into the weight of the evidence supporting a finding if there be a substantial conflict in the evidence.

The complaint here is, in effect, an *indebitatus assumpsit* count at common law, and declares upon an executed contract. While it lacks the ordinary allegations of indebtedness and that the services were rendered at defendants' request (*Estee's Pleadings* [Boone], 4th ed., secs. 905, 912), these

averments are unnecessary when the consideration as well as the promise are implied from the nature of the transaction declared on. (*McFarland v. Holcomb*, 123 Cal. 86, [55 Pac. 761].)

Such pleading is allowable under our code (*Farwell v. Murray*, 104 Cal. 464, [38 Pac. 199]; *Pleasant v. Samuels*, 114 Cal. 37, [45 Pac. 998]), and its use carries with it the general rule applicable to such counts. (*Castagnino v. Balletta*, 82 Cal. 258, [23 Pac. 127].) It is said in Chitty on Pleading, *page 343 et seq.: "Several distinct debts due in respect of different contracts not under seal, of the same or a different nature, as demands for work, and debts for goods, moneys lent, etc., might always be included in one count of this description; and the plaintiff would succeed *pro tanto*, though he only prove one of such contracts. . . . Under an *indebitatus* count the plaintiff may recover what may be due to him although no specific price or sum was agreed upon (the promise being implied), and therefore it has been observed that the *quantum meruit* and *quantum valebat* counts are in no case necessary, and should in many cases be omitted to prevent unnecessary prolixity and expense. . . . However special the agreement was . . . and the terms of it have been performed on the plaintiff's part and the remuneration was to be in money, it is not necessary to declare specially, the common *indebitatus* count is sufficient" (*p. 348).

The plaintiff testified, and he is corroborated by his foreman, that he fully completed the grading and excavating according to his contract, the court so finds, and a case was made that justified such a pleading. Had he failed to sustain the burden of proving a completed contract his case must have failed as to any work done under the contract; and, without a *quantum meruit* or other count to support a judgment upon a part performance, he could have recovered nothing. The express promise as to the work done under the executed special contract and the implied promise as to the extra work could be declared on in the one count, since they together constituted the indebtedness due from defendants to plaintiff upon contracts that were fully executed. The indebtedness had become a single claim for money due for grading and excavating. The rule here is similar to the one applied to the more familiar form of common count, an account stated. All the items and transactions preceding the stating

of the account become merged in the one account stated. The law implies a promise to pay this, and permits an action to be brought upon the single sum ascertained to be due, without pleading any of the items or transactions from which the result was obtained. If defendants had desired to ascertain the items of the claim, they could have obtained them under the provisions of section 454 of the Code of Civil Procedure. (*Farwell v. Murray*, 104 Cal. 464, [38 Pac. 199].)

The issue as to whether or not there was a waiver of the engineer's certificate was properly tried by the court under the implied allegation of the complaint that the contract had been fully executed and performed by the plaintiff, and that nothing remained to be done but to pay the money agreed to be paid. (*Minor v. Baldridge*, 123 Cal. 190, [55 Pac. 783].) The special contract was admissible in evidence to establish the measure of compensation for the labor performed under it. (*Herman v. Littlefield*, 109 Cal. 430, [42 Pac. 443].) Whether a demurrer for uncertainty would lie to such a complaint appears to be in doubt. (*Pleasant v. Samuels*, 114 Cal. 37, [45 Pac. 998]; *Shade v. Sisson*, 115 Cal. 357; *McFarland v. Holcomb*, 123 Cal. 86, [55 Pac. 761]; *Minor v. Baldridge*, 123 Cal. 190, 55 Pac. 783.) In the last-cited case, while the mode of pleading here followed is criticised as inconsistent with the code provisions requiring the party to state the facts constituting his cause of action, it is expressly held that it is too well established to be declared improper.

The action, then, is neither on the special contract nor on a *quantum meruit*. The findings are within the pleadings, and there is evidence to sustain them all. Plaintiff testified that he completed the work under his contract according to the specifications thereof. In this he was corroborated by his foreman. As to the certificate from the engineer, he testified that it was unjustly and fraudulently detained from him by the engineer because of a personal quarrel. The testimony of the defendant Houston and his witness Gibson corroborate this in part, to the extent of establishing that they quarreled over the setting of stakes on the job. Plaintiff testified that the engineer withheld the certificate to compel the payment of a personal debt for these stakes claimed to be due from plaintiff to the engineer. While the letter was not in evidence and cannot be considered here, this statement is cor-

roborated by the letter of Mr. Wood which is made a part of the showing on the motion for a new trial.

If the trial court accepted the explanation of plaintiff, which it had a right to do, and found the withholding of the certificate was a fraud upon plaintiff and without warrant, there was evidence to sustain it, and the complaint was sufficient to support the finding without the fraud or excuse being specifically pleaded or set out. (*Minor v. Baldrige*, 123 Cal. 190, [55 Pac. 783].)

Conceding the complaint to be insufficient for the reasons claimed by appellant, there is another rule of pleading applicable here which would still require that the findings and decision of the trial court be sustained. All the issues which it is contended the complaint should have tendered were set forth by the answer, counterclaim and cross-complaint of defendants and issue thereon joined by plaintiff's answer to the two latter pleadings. The rule is well settled that a complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment, or express denial, of that fact in the answer, as to uphold a judgment thereon. (*Vance v. Anderson*, 113 Cal. 537, [45 Pac. 816].) The omission will also be cured by its averment in a cross-complaint of the defendant, and this although a demurrer to the complaint for the want of the fact has been erroneously overruled. (*Cohen v. Knox*, 90 Cal. 266, pp. 275, 276, [27 Pac. 215]; *Daggett v. Gray*, 110 Cal. 172, [42 Pac. 568].) The case was tried and findings made upon the issues tendered by defendants' pleadings, and it would be a vain thing to reverse the judgment, to direct the plaintiff to amend his complaint by averring facts already averred in the cross-complaint, and to again, in that form, present issues which have already been raised and determined. (*Cohen v. Knox*, 90 Cal. 266, [27 Pac. 215]; *Antonelle v. Kennedy etc. Lumber Co.*, 140 Cal. 320, [73 Pac. 966].)

We have accepted the statement in appellant's reply brief in regard to the extension of time given on the service of statement on motion for a new trial and considered the appeal on its merits. We find no error in denying the motion for a new trial. The affidavit filed with the motion presenting the subsequently discovered letter of the engineer does not present any new evidence that would, if admitted, be

sufficient to justify a change in the decision to the advantage of the defendants.

No error appearing from the record, judgment and order of the trial court are affirmed.

Allen, P. J., and Shaw, J., concurred.

[Crim. No. 35. Third Appellate District.—May 23, 1907.]

THE PEOPLE, Respondent, v. AMADEO BIANCHINO, Appellant.

CRIMINAL LAW—RAPE—MOTION TO SET ASIDE INFORMATION—LEGALITY OF COMMITMENT.—Where the only ground of a motion to set aside an information for rape was that the defendant was not legally committed by a magistrate, evidence of a commitment indorsed on the complaint and signed by the committing magistrate, stating that "it appearing to me the offense, to wit, felony rape, in the within complaint mentioned has been committed and there is sufficient cause to believe the within Amadeo Bianchino guilty thereof, I order that he be held to answer the same," etc., shows an order in strict accord with the requirement of section 872 of the Penal Code.

ID.—VARIANCE NOT URGED—VARIANCE IN DATE UNIMPORTANT.—Where no ground of variance in the description of the offense was urged upon the motion, it cannot be considered as a ground thereof. But where it appears that only one offense was committed, a mere variance in the date thereof between the complaint and information is unimportant.

ID.—EVIDENCE—RAPE OF CHILD—REMOTENESS OF COMPLAINT—INFECTION OF VENEREAL DISEASE.—Where the rape was committed upon a child five years of age who was incompetent to testify, and the child became infected with a venereal disease as the result of the rape, the complaint of pain by the child, and as to the cause of it, was not too remote under the circumstances. The rule of corroboration does not apply where the child is of too tender an age to testify.

ID.—REFUSAL TO ALLOW DEFENDANT'S PHYSICIAN TO EXAMINE CHILD—HARMLESS RULING.—*Held*, that the refusal of the court to allow defendant's physician to examine the child was harmless in view of the facts.

ID.—ORDER OF PROOF—CORPUS DELICTI—DISCRETION.—The order of proof is largely within the discretion of the court. The *corpus delicti* should ordinarily be shown first; but unless it clearly appears that defendant was prejudiced by a ruling permitting other evidences before the *corpus delicti* was established, such ruling will not justify a reversal.

APPEAL from a judgment of the Superior Court of Tuolumne County, and from an order denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

J. C. Webster, for Appellant.

U. S. Webb, Attorney General, C. N. Post, Assistant Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—Defendant was convicted of the crime of rape, alleged to have been committed on the person of Annie Lertora, a child of the age of five years, and was sentenced to a term in the state prison at Folsom. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

1. It is contended that the court erred in denying the motion of defendant to set aside the information. The motion was as follows: "Now comes the defendant in the above entitled action, and moves the court to set aside the information on file herein on the ground that before the filing thereof, he, the said defendant, had not been legally committed by a magistrate." The evidence, however, introduced in support of the motion, proves to the contrary that the defendant *was legally committed by the magistrate*. The order indorsed on the complaint or deposition and signed by the committing magistrate is as follows: "It appearing to me that the offense, to wit, Felony, Rape, in the within complaint mentioned has been committed and there is sufficient cause to believe the within Amadeo Bianchino guilty thereof, I order that he be held to answer the same," etc.

The foregoing order seems to be in strict accord with the requirement of section 872 of the Penal Code, which provides that "The magistrate must make or endorse on the complaint an order signed by him to the following effect:

It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer to the same."

It will be observed that the magistrate designated the offense as "felony, rape," thereby describing it generally as he is permitted to do, under the statute. He made it more definite, however, by stating that it was the "rape mentioned in the within complaint." It was such an order as the statute contemplates, and it afforded authority for the district attorney to file an information in the superior court. But it is contended that the district attorney filed an information charging a different offense from that for which defendant was held to answer, and therefore the motion should have been granted. The motion, as we have seen, did not raise the point, as it was based upon the ground that the defendant had not been legally committed at all, and not that he had not been committed for the offense charged in the information. A defendant should be required, in a technical matter of this character, to stand or fall upon the ground that he has deliberately chosen, and the law should impose upon him also the duty of pointing out in his motion the particular defect upon which he relies in order that the district attorney, if he deems it advisable, may amend the information and thereby avoid the danger and expense of a mistrial. If he fails to do so in a case like the one at bar, where the only point involved in the motion is an apparent variance between the date of the offense as it appears in the order and as shown by the information, he should be precluded from raising the question in any subsequent proceeding. However, assuming that the issue is properly before us, it must be held that the information does not charge a different offense from that recited in the order of commitment. There can be no pretense that the investigation before the committing magistrate and in the superior court concerned more than one offense. The evidence disclosed only one act of criminal intercourse, and the only variance between the commitment and the information relates to the particular date of the commission of the crime. This variance, however, is unimportant when it is apparent that only one offense was committed.

The same rule should apply here as in the case of a variance between the evidence at the trial and the allegations of the information as indicated by section 955 of the Penal Code, which provides that: "The precise time at which the offense was committed need not be stated in the indictment or information, but may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense."

If the contention of appellant should prevail we would have this singular situation: The district attorney will be required to file another information alleging that the offense was committed on or about the ninth day of March, when he knows that the evidence will disclose that it was committed on or about the first day of February. In other words, because the magistrate has committed a mistake in the date of the offense the district attorney must allege an error before he can be permitted to establish the true date. This, of course, is unreasonable. There is nothing in any of the cases cited opposed to our view. In *People v. Lee Look*, 143 Cal. 216, [76 Pac. 1028], it is held, as stated in the syllabus: "An information is based on the commitment and not on the complaint for arrest and it is the duty of the committing magistrate to hold the defendant for the offense proved whatever might have been the offense charged."

People v. Warner, 147 Cal. 546, [82 Pac. 196], is to the same effect and cites with approval the *Lee Look* case. In *People v. Nogiri*, 142 Cal. 596, [76 Pac. 490], it was held that the motion to set aside the information should have been granted, but the magistrate held the defendant for assault with a deadly weapon and the district attorney charged the defendant with the crime of assault with intent to commit murder—a totally distinct offense.

2. It is complained that the testimony of witnesses for the prosecution was allowed, over defendant's objection, to the effect that the child, Annie Lertora, made complaint some time after the injury to her. Two grounds for this objection were urged—first, that the complaint was too remote from the time of the occurrence, and, second, that as the child did not testify it was error to allow any testimony as to a complaint made by her. The date of the alleged injury is not definitely fixed, but was, according to the evidence and defendant's admission, some time in January, 1906, toward

the latter part of the month. Witness Stratton, the family physician, was called to treat the child on February 5, 1906, and found the involved parts much inflamed and somewhat lacerated, and a few days later discovered that the child was infected with a venereal disease. It was shortly before and after February 5th that the complaints referred to were made, some of which were voluntary, and others after the child was questioned by the witnesses. The court seems to have been careful to keep within the rule in this class of cases, and so far as we can discover the complaints were not too remote under the circumstances. The child was too young to be fully conscious of anything wrong in the act, or to experience any sense of shame, and, considering the relations of defendant to the family and his familiarity with the child, she may not have comprehended the nature of the act or thought of complaining earlier than she did. When the disease developed and she found herself suffering additional pain the complaint was naturally renewed. The more serious question is as to the admissibility of the complaint, inasmuch as the child did not testify at all in the case. The evidence is admissible as corroborative of the testimony of the prosecuting witness, and the authorities generally hold that, unless the prosecuting witness testifies, her complaint is mere hearsay and inadmissible. Our supreme court seems to have considered that the rule does not apply where the child is of too tender an age to testify. (*People v. Figueroa*, 134 Cal. 159, [66 Pac. 202].) We feel bound by this decision to sustain the ruling of the lower court.

3. Defendant moved the court for the appointment of a physician to examine the child. The motion was denied and defendant excepted. If the court had made the order it is difficult to see how it could have compelled an examination if the mother or child had objected. But assuming that authority existed to make the order and that it could have been rendered effective, we cannot say that the denial of the application resulted in prejudice, as the result of another examination might have been unfavorable to defendant. Besides, there is nothing to show that the defendant could not have had the child examined by any physician that he might select.

4. The testimony of the witness Stratton as to the physical condition of the child was objected to on the ground that the

corpus delicti had not been shown. The order of proof is largely within the discretion of the court. The *corpus delicti* should first be shown ordinarily, but unless it clearly appears that the defendant was prejudiced thereby, a ruling permitting other evidence before the *corpus delicti* is established will not justify a reversal of the judgment. (*People v. Jones*, 123 Cal. 65, [55 Pac. 698].)

Some other alleged errors are assigned, but we find nothing in any of them to demand a reversal of the judgment. No exception was taken to certain rulings of which complaint is made and they therefore cannot be considered.

We cannot say as a matter of law that the evidence is insufficient to support the judgment.

The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 27, 1907.

[Civ. No. 312. Third Appellate District.—May 28, 1907.]

NEVADA NATIONAL BANK OF SAN FRANCISCO, Respondent, v. BOARD OF SUPERVISORS OF KERN COUNTY et al., Appellants.

IRRIGATION DISTRICT—PAYMENT OF INTEREST ON BONDED INDEBTEDNESS—REFUSAL TO LEVY ASSESSMENT—MANDAMUS—JURISDICTION.—Where the board of directors of an irrigation district have refused to levy an assessment to pay the interest on its bonded indebtedness, and the board of supervisors, after a petition therefor, have refused to levy such assessment, as provided by the act of March 31, 1897, providing for the organization and government of irrigation districts, the superior court of the county in which the irrigation district is situated has jurisdiction to compel the levying of such assessment by the board of supervisors, in the absence of a showing that the office of its board of directors is not within the county. The presumptions are in favor of the jurisdiction of the court.

ID.—EXPENSE OF LEVY AND ASSESSMENT.—The expense of the levy and assessment, in addition to the annual interest, is a proper charge against the irrigation district.

ID.—RIGHTS OF JUDGMENT CREDITORS TO WRIT OF MANDATE.—A judgment creditor of an irrigation district has the right to call upon its board of directors to pay the judgment, and upon their refusal or neglect to do so, to have recourse to the supervisors, and, upon their refusal to levy an assessment sufficient to pay the judgment, to apply for a writ of mandate to compel such levy.

ID.—RES ADJUDICATA—EFFECT OF JUDGMENT ON ORIGINAL OBLIGATION.—Neither the board of directors, nor the board of supervisors, nor the taxpayers of the district can defend the proceeding in *mandamus* on any of the grounds litigated, or which might be litigated in the action in which the judgment was rendered. The judgment does not create a new obligation, but simply presents, in a different form, the obligation already assumed, and affords the highest sanction of the law to its validity.

ID.—EXCESS OF JURISDICTION—PAYMENT OF JUDGMENT BY SUPERVISORS—NEW TRIAL NOT REQUIRED.—The court exceeded its jurisdiction in directing the supervisors to pay plaintiff's judgment out of the moneys collected by them. Such direction should be stricken out; but the error does not necessitate a new trial.

ID.—CONSTITUTIONALITY OF SECTION 39.—Section 39 of the act in question is not in violation of any provision in the present constitution of the state.

ID.—CONSTRUCTION OF STATUTE—LEVY TO PAY SEVERAL UNPAID INSTALLMENTS.—One levy may be made under the statute to pay the aggregate amount of installments of interest and principal, which have fallen due in previous successive years.

ID.—JUDGMENT—FAILURE TO PROVIDE FOR OTHER CREDITORS—PRESUMPTION.—The judgment in *mandamus* requiring a levy sufficient to pay plaintiff's debt is not erroneous because it fails to provide for other creditors. If there are other creditors whose claims the irrigation district is solicitous to have paid, it is fair to presume that it will not object to an increase in the levy to meet such other obligations.

APPEAL from a judgment of the Superior Court of Kern County. Paul W. Bennett, Judge.

The facts are stated in the opinion of the court.

J. W. P. Laird, C. L. Clafin, H. L. Packard, G. W. Zartman, H. V. Kimberlin, and G. H. Smith, *amicus curiae*, for Appellants.

Heller & Powers, for Respondent.

BURNETT, J.—The judgment or decree from which the appeal has been taken is as follows:

“The alternative writ of mandate issued in this action having been served on defendants and the said defendants having appeared and answered the verified petition of plaintiff and the issues thereby joined having been brought for trial before this court sitting without a jury this 13th day of February, 1905, Messrs. Heller & Powers appearing as attorneys for plaintiff and J. W. P. Laird, Esq., appearing as attorney for defendants and documentary and oral evidence having been introduced and the matter having been argued and submitted, this Court finds that all of the allegations set forth in plaintiff’s petition or complaint are true and that the Poso Irrigation District is a municipal corporation organized under the laws of the State of California, and is wholly situated in the County of Kern, State of California, and that the Superior Court of the County of Kern, State of California, in the action therein pending, wherein the above named plaintiff was plaintiff, and the said Poso Irrigation District was defendant, duly gave, made and entered a judgment, requiring said Poso Irrigation District to pay the said plaintiff the sum of \$12,262.96, together with interest thereon, at the rate of seven (7) per cent per annum, from the 26th day of August, 1902, and for other purposes, and that said Poso Irrigation District has no funds to be applied to the payment of said judgment and that there is no property belonging to said Poso Irrigation District upon which execution could be levied and that the officers of said irrigation district have refused and neglected to levy an assessment or do or perform any of the acts provided by law, to assess the real property in said district, for the purpose of paying the money due on said judgment; and that the defendant, Board of Supervisors, after petition to do so, to it, has also refused to take the necessary steps to levy an assessment on the property of said district, or to cause any levy of any assessment to be made on the property in said district or to take any steps for the purpose of assessing said district, and collecting the taxes on the property in said district, in order to pay said judgment; and that plaintiff is a party beneficially interested and has no means of collecting its judgment without the action of said defendant, and that

said plaintiff has no plain, speedy, adequate, or other remedy in the ordinary course of law.

"Now, therefore, it is hereby ordered, adjudged and decreed that said defendants immediately proceed to levy an assessment in accordance with law upon the real property within the boundaries of said Poso Irrigation District which is subject to an assessment of said district sufficient to pay said judgment of plaintiff, to wit, the sum of \$12,262.96, together with the interest thereon at the rate of seven (7) per cent per annum from the 26th day of August, 1902, and also all expenses incident to the making of said levy and assessment and incident to the collection of said assessment, which expenses shall be estimated by the said defendant, Board of Supervisors, and shall be included within said levy and shall also include plaintiff's costs in this action, which are hereby taxed at \$. against said defendant and which shall be included within said levy and when sufficient money is collected the defendant shall pay to plaintiff from the sum collected whatever amounts are collected on said assessments until said plaintiff shall be paid the said amounts hereinbefore referred to, to wit, the sum of \$12,262.96, together with interest thereon at the rate of seven (7) per cent per annum from the 26th day of August, 1902, and the costs of suit herein.

"And it is further ordered, adjudged and decreed that a peremptory writ of mandate shall be issued to said defendants commanding them to forthwith do the acts herein ordered that they shall do, and that a return day be inserted in said writ as on or before the 15th day of September, 1905.

"PAUL W. BENNETT,

"Judge of the Superior Court."

The action is based upon the provisions of section 39 of "An Act to provide for the organization and government of irrigation districts, approved March 31, 1897," which is in the following language:

"Sec. 39. The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and in any year in which any bonds shall fall due must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the

board must compute and enter in a separate column of the assessment-book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury and be apportioned to the several proper funds.

"In case of the neglect or refusal of the board of directors to cause such assessments and levies to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessment for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment-roll for said district to be prepared, and shall make the levy required by this act, in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bonds as in other cases."

The bonded indebtedness herein involved was incurred prior to the enactment of said statute, but this circumstance is unimportant in view of the fact that the act of 1889 passed prior to the issuance of the said bonds and amending the act of 1887, known as the Wright Irrigation Act, contains a provision identical, as far as the question before us is concerned, with said section 39 of the act of 1897. The judgment herein is vigorously assailed by numerous counsel, including a learned "friend of the court," and we have examined with care the points and cases to which our attention has been directed, and we shall proceed to state our views thereon in the order in which the various propositions are advanced in the briefs.

The position of appellants, as stated by counsel, is that the judgment must be set aside and the writ vacated, because:

"1. The petition upon which the writ is based is wholly insufficient to give the court jurisdiction to issue the peremptory or any writ herein.

"2. The court exceeded its authority and jurisdiction in its direction to the board of supervisors by said writ:

"(a) In directing a levy and collection for plaintiff's costs expended in the present action.

"(b) In directing a levy for expenses to be incurred in such levy and collection.

"(c) In directing said board to estimate such expense for the purpose of levy and collection.

"(d) In directing said board to pay over to said plaintiff, when collected, the amounts due it on its said judgment.

"3. The court exceeded its jurisdiction in directing said board of supervisors to make levy to pay said judgment.

"4. That section 39, upon which this proceeding is based, is unconstitutional and void."

In addition to the foregoing, the brief filed by "*amicus curiae*" presents specifically these considerations: "1. Upon the failure of the board of directors or of the board of supervisors, in any year, to levy an assessment for the interest, or the interest and installments of principal, falling due in that year, its power ceases. In other words, the act does not confer upon the directors or the board the power to make a general assessment for the aggregate of indebtedness accruing for the previous years, or, as in this case, for a period of sixteen years. The power, if it exists, can only be to make separate annual assessments for each year based on the values of that year; for otherwise the obligations of the parties would be varied and the act would be unconstitutional. *But this, from the nature of things, is impracticable, at least after the lapse of a year or two, and it is, therefore, submitted that the provision of the amendment of 1889, conferring the power of assessment upon the board of supervisors, is, on this account, a mere brutum fulmen, and practically void.* 2. By the provisions of the statute the taxes collected constitute a common bond fund for the benefit of all the creditors and all have a common interest in it. . . . A suit, therefore, to dispose of this fund cannot be maintained without making the others parties, or suing for their common benefit. (Code Civ. Proc., secs. 378, 379, 382, 389, and *Meyer v. City of San Francisco*, 150 Cal. 131, [88 Pac. 722].) 3. If in this state the equitable doctrine as to laches be held to apply to proceedings of the court generally (*Grain v. Aldrich*, 38 Cal. 514, [99 Am. Dec. 423]), a very extreme case of laches is here presented."

In support of their first proposition it is urged by appellants that the petition for the writ of mandate is fatally defective in that it does not appear therein that the office of the board of directors of the irrigation district is situated in Kern county where the suit was brought. The contention is based upon the language of said section 39 that "the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment," etc. There was no corresponding allegation nor finding in the case at bar, and it is claimed that this is jurisdictional. As far as the absence of any finding is concerned, no such issue was presented, and it is hardly necessary to cite authorities to the point that the findings must be confined to the issues made by the pleadings. But appellants are wholly at fault in their claim that the want of jurisdiction is disclosed by the allegations of the petition. They have entirely mistaken the rule as applied to the jurisdiction of courts of record. The presumptions here are in favor of jurisdiction and not against it. There can be no question that under the authority with which superior courts are clothed by the constitution, the superior court in and for Kern county, in the exercise of its general powers, had jurisdiction to entertain an application for a writ of mandate against the supervisors of that county. If there were any exceptional circumstances which, if disclosed, would devert the court of jurisdiction, in the absence of any allegation concerning them in the complaint, the burden is upon the defendants to present them. Since it does not affirmatively appear that by reason of the peculiar condition suggested the court did *not* have jurisdiction, by virtue of its general authority the presumption must be indulged against appellants' contention. But again, it is manifest that the provision was intended for a case where the irrigation district comprised land in more than one county. Here it appears that it is confined entirely to Kern county. There seems to be no merit in this contention, and we have probably devoted to it more attention than it deserves.

In the specification of particulars wherein it is alleged the court exceeded its authority in its direction to the board of supervisors, exception is taken to that portion of the decree providing for the costs of the present action and expenses to be incurred in the levy and collection of the judgment. It is insisted that said section 39 limits the power of the board

of directors of the district to the levy of an assessment sufficient to raise the annual interest on the outstanding bonds, and in any year in which any bonds shall fall due to increase such assessment to an amount sufficient to pay the same as they mature, and that the delegation of authority to the board of supervisors cannot be more comprehensive than the authority conferred upon the board of directors in the first instance. The consideration of the costs of the present action may be eliminated, as the record shows that no amount was awarded for costs. The expenses of the levy and assessment would seem to be a legitimate portion of the burden to be borne by the property owners in whose behalf the bonded indebtedness was incurred. In fact, said section 39 makes provision for it in this language: "and all expenses incident thereto shall be borne by such district." If we understand the position of appellants, it is that other provision is made for said expenses in case of the levy by the board of directors, and since there is a delegation of power to the supervisors, their authority is limited to the method pointed out for the directors to pursue. Of course, the act contemplates that the board of directors will do its duty, and ample provision is made in detail for incurring and liquidating a bonded indebtedness. But we do not understand that in the technical sense the authority conferred upon said directors is sought to be delegated to the board of supervisors. Rather is it true that the board of directors is empowered to bind the district by taking certain steps, and the authority of the said board to liquidate an indebtedness must be exercised in the manner pointed out. But in case of its refusal or neglect to act, then the board of supervisors is granted directly by the legislature the power to levy an assessment to provide not only for the payment of the amount due but also for the expense of said levy. The statute does not expressly provide that the expense shall be included in said levy, but it is fairly implied, and any other construction seems unreasonable. The context clearly shows, we think, that in this way the expenses "shall be borne by the district."

The case of *Boskowitz v. Thompson*, 144 Cal. 724, [78 Pac. 290], cited by appellants, is not in point. That was not a case where the directors refused to act. It was a suit to enjoin the collection of an assessment, and no such question was considered as is involved here in reference to the authority

of the board of supervisors in the premises. The important point decided therein is shown by the following quotation: "A court of equity, as such, in the absence of statutory authority, has no jurisdiction to enforce a lien that is created by statute, for the enforcement of which the statute has provided a mode. The enforcement of the lien in such case can be only in the mode provided by the statute." It was also held that the court should have determined the validity of the assessment which it was sought to collect. There is nothing in that case inconsistent with our position here, as we hold that the court below directed the board of supervisors to follow the mode that is at least implied by the statute. The objection that the board of supervisors is without authority to estimate the expenses of levying and collecting the assessment is also without persuasive force. As suggested by respondent, no one is presumably better fitted to make the estimate than the supervisors, and we think it is implied that they should do so when an emergency arises such as in the case at bar.

The position taken by appellants that the lower court exceeded its jurisdiction in directing the board of supervisors to pay over to the plaintiff from the sum collected a sufficient amount to satisfy plaintiff's demand seems to be in accord with the statute. Respondent rather concedes that the judgment is erroneous in this respect, but claims that it "does not affect the validity of other portions of the decree," and that the decree can be modified by striking out that provision, leaving other portions of the decree in full force and effect. Since the act provides in the first instance that the tax collector and treasurer of the district shall collect and receive the money, and "in case of neglect or refusal of either of them to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must respectively perform such duties, and shall be accountable therefor upon their official bonds as in other cases," and as there is no authority to depart from the provisions of the act, the portion of the decree complained of should be stricken out. There is no good reason, though, why this should necessitate a new trial.

We cannot see any merit in appellants' contention stated by them as follows: "The petition to the board of supervisors as well as the writ prays that a levy to pay the judg-

ment therein set out be made by said board of supervisors in conformity with the act in question, and more particularly in conformity with subdivision 39 thereof. As we have already pointed out, section 39 relates specially to interest on outstanding bonds. *The decree and the writ directs the levy to pay a judgment.* The original contract between plaintiff and the district is so completely merged in the judgment, in a new form of contract, that the court cannot see that it is for interest on outstanding bonds, and therefore payable by the provisions of section 39." A large number of cases is cited in support thereof, but their effect seems to have been misapprehended. The quotation made by appellant from *Taylor v. Root*, 4 Keyes (N. Y.), 344, may be accepted as a fair expression of what is held in all of them: "The cause or consideration of the judgment is of no possible importance; *that is merged in the judgment.* When recovered the judgment stands as a conclusive declaration that *the plaintiff therein is entitled to the sum of money recovered.* No matter what may have been the original cause of action the judgment forever settles the plaintiff's original claim. . . . This assent may have been reluctant, but in law it is an assent, and defendant is estopped by the judgment to dissent. *Forever thereafter, any claim on the judgment is setting up a cause of action on the contract.*" It is hard to perceive how appellant can obtain any comfort from the quotation. It is too well settled to be controverted that a judgment does not create a new obligation. It simply presents in a different form the obligation already incurred, and besides, it affords the highest sanction of the law to the validity of the obligation.

It seems to be established by the authorities that the proper course to pursue when municipalities refuse to pay their bonds is by an action at law to establish the validity of the bonds and the amount due thereon, and then to apply for a writ of mandate to compel the proper authorities to raise what is required to satisfy the debt by the assessment and levy provided by statute. The following cases cited by respondent so hold: *Heine v. Commissioners*, 19 Wall. 655; *Herring v. Modesto Irr. Dist.*, 95 Fed. 705, 710; *Marra v. San Jacinto and Pleasant Valley Irr. Dist.*, 131 Fed. 780, 789, and *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860, [59 C. C. A. 70]. The latter case was similar to the one at bar,

involving the same statute, and from it the following quotation seems germane:

"The present proceeding is not a new action to establish the rights of the defendant in error as against other parties. It is a proceeding in the nature of an execution to enforce the judgment already rendered. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment as well as his right to have recourse to the board of supervisors in case of the refusal or neglect of the board of directors to make the levy and assessment. Neither the board of directors nor the board of supervisors nor the taxpayers of the Perris Irrigation District can be heard to defend the present proceeding on any of the grounds litigated, or which might have been litigated, in the former action."

The principal attack directed against the judgment is based upon the ground that said section 39 is unconstitutional for these reasons: 1. Because it delegates the power to assess and collect taxes in the district to other than corporate authorities thereof; 2. Because it directs the assessment of property within the district to be made by persons not representatives of the district; 3. Because it delegates to a legislative officer the power to perform the purely executive functions of the assessor. In this connection attention is directed to section 12, article XI, and section 10, article XIII, of the constitution of this state and numerous decisions of our supreme court. Said section 12, *supra*, provides that "the legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes," and said section 10 provides for the assessment of property where it is situated "in the manner prescribed by law."

As pointed out by respondent, many of the decisions cited by appellant were rendered under the constitution of 1849, which contained the following provision: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law; *but assessors and collectors of town, county and state taxes shall be elected by the qualified*

electors of the district, county or town in which the property taxed for state, county or town purposes is situated." If that provision were a part of the organic law now it is probable that said section 39 would be unconstitutional, in so far as it provides for the steps to be taken by the board of supervisors, but under the present constitution the power to assess and collect taxes is conferred upon "the corporate authorities," with the restriction that the assessment shall be made where the property is situated and in the manner prescribed by law. We cannot see that said section 39 is in conflict with this requirement. The board of supervisors is a "corporate authority" of the district, and the assessment and levy according to the terms of the decree are to be made as "prescribed by law."

In the case of *McCabe v. Carpenter*, 102 Cal. 470, [36 Pac. 837], it is said: "It is contended that the law (referring to a statute establishing high schools) is unconstitutional, in that it authorizes the county superintendent of schools to furnish to the board of supervisors an estimate for the tax, and makes it the duty of the board to proceed to fix a rate which will realize the amount, thus leaving the amount of the tax *wholly to the discretion of an executive officer, and leaving no discretion in the board.*" The conclusion of the court, announced by Commissioner Temple, was: "But, since the power to levy a tax is purely legislative, it would seem to follow that the power cannot be vested in any other authority of the local corporation than the body in which is vested the legislative power of such municipal corporation. At all events it could not vest such power in an executive officer of such corporation."

Here the board of supervisors is authorized to make the levy in case of the refusal of the directors to act, the statute in question makes the board a part of the "corporate authority" of the district, the board is undoubtedly a legislative body; it does not make the assessment, but bases the levy upon the assessment made by the county assessor, and we fail to see how there is any violation of the provisions of the constitution, especially when, as here, the district is confined to one county.

In *Board of Education v. Board of Trustees*, 129 Cal. 604, [62 Pac. 173], there is an interesting discussion of article I, section 12, of the constitution, and it is said by the court

through the commissioner, who is the *amicus curiae* herein; "These provisions apply to all kinds of public or municipal corporations, or we may say to all municipalities and quasi municipalities. These differ greatly in their organization. In some, as in cities generally, the powers of the government are distributed into separate departments; in others all the powers of the municipality are vested in one body—as, e. g., in the board of supervisors of a county, the board of trustees of a school district, etc. In the latter case the board of supervisors or board of trustees, or other governing body, constitutes the corporate authority of the municipality, in which might be vested the power to impose taxes." So it may be admitted that in the first instance the duty here is cast upon the board of directors of the district to make the levy, but in case of its refusal to act, the board of supervisors constitutes the legislative corporate authority to supply the omission. The power of the legislature is not exhausted when it confers the authority upon the directors, but it may also authorize the supervisors to perform a similar function in certain contingencies. This it has done. It would seem just and reasonable that this power should be lodged in some body outside of the board of directors of the district to meet such an emergency as is here presented, where, according to the findings of the court, said directors have repudiated a legal obligation and have endeavored to prevent its enforcement.

There seems to be no decision of the supreme court passing directly upon the constitutionality of the proceeding herein involved, but an application of the principles so clearly enunciated in the able opinion of Mr. Justice Harrison in the leading case of *In re Madera Irr. Dist.*, 92 Cal. 296, [27 Am. St. Rep. 106, 28 Pac. 272], wherein the Wright irrigation law is upheld, in our opinion leads to the conclusion that said section 39 is not obnoxious to the constitution. In that case it is said: "Whenever a special district of the state requires special legislation therefor, it is competent for the legislature, by general law, to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the legislature may clothe it with such as in its judgment are proper to be exercised within and for the benefit of such district." And it was held that these corporations

are mere agencies of the state in local government; that they possess only the powers conferred by the legislature, and that it was the purpose of the constitution to leave in the hands of the legislature full discretion in reference to the government of said corporations. In the exercise of this discretion the legislature has conferred upon the legislative body of the county a certain supervisory authority over the district. This seems to be a reasonable provision in furtherance of the design of the framers of the constitution. As the section, when fairly construed, requires the board of supervisors to base the levy upon the assessment of the county assessor, there would seem to be no force in the contention of the appellant that the property owners have no opportunity to be heard to correct any defects in the assessment.

The most serious objection, probably, is the one made by the *amicus curiae* "that an annual assessment upon the real property in the district is the exclusive mode provided by the statute for the payment of the principal of the bonds authorized by the statute to be issued." In this connection he cites the case of *Merchants' Bank v. Escondido Dist.*, 144 Cal. 329, [77 Pac. 937]. It is therein stated: "The act providing for the organization of the district, and the organization of the district under the provisions of the act by the votes of the electors cannot be otherwise regarded than as a contract between the state and the individuals whose property was thereby affected." The soundness of that proposition would scarcely be questioned by anyone. It is further stated that: "The burden thus imposed was that the bonds issued under the act should be paid by revenue derived from an annual assessment upon the real property of the district, and that their lands 'should be and remain liable' for such assessment, and this implied that this should be the extent of the burden. But by the amendatory act the board of directors is authorized, without the consent, or even the knowledge, of the land owners, to pledge or hypothecate the property acquired with their money." Hence it was held that the amendment would deprive the land owners of their property without due process of law, and was also a violation of the inhibition against impairing the obligation of contracts, since the property owners were only liable "for continued assessments until the balance of the bonds shall be paid." No fault can be found with that decision as applied to the facts of the case. The amend-

ment held unconstitutional was enacted after the issuance of the bonds, and it is too clear for argument that it gave the bondholders security that was not provided by the law at the time the obligation was incurred by the district, and was, therefore, in violation of the terms of the contract between the debtors and creditors. The case is in point here if it can be shown that the method provided for the collection of the debt adds to the property owners an additional burden to what was imposed by the statute at the time the bonds were issued. But, as we have seen, the statute has not been substantially changed, and so the question resolves itself into one as to the proper construction of said section 39. The statute, no doubt, contemplates annual assessments, as it is constructed upon the theory that the board of directors will do its duty, but it does not prescribe that this shall be the exclusive method of raising the money to pay the bonds.

The argument made by respondent is substantially this: The board of directors of the district is not required to levy the assessment at any particular date, but must make it after the equalization of the assessment made by the assessor of the district. This levy by said board may be as late, then, as the end of the fiscal year, and hence it could not be said to be in default till the end of the year, and hence the powers of the supervisors could not be invoked till after that time. The power of the board of supervisors must, therefore, be exercised in making the levy for the payment of interest coupons or installment coupons which matured in a previous year. Furthermore, the statute does not provide the time when the levy shall be made by the supervisors, and there is nothing therein inconsistent with the position that one levy may be made for the payment of the aggregate amount of installments of interest and principal due in successive years.

The contention of the *amicus curiae* is: "If the power still exists in the directors or supervisors to make any assessment and levy, it can only be to make several assessments for each year, and each assessment must be of the values of the lands of the district in that year." This, he contends, is impracticable, and hence he would have the court reach the conclusion that there is no method provided for the payment of the debt, and the bondholders are without redress.

We are not inclined to consider the law so impotent as is implied by appellants' argument. We hold that the bur-

dens of the property owners have not been increased, since they incurred the obligation to pay these bonds. The statute, in our opinion, does not expressly nor by implication prohibit the method adopted herein for the collection of the money due. In fact, the forbearance to sue for several years, and the use of one levy instead of many constituted a favor to the debtors, and tended not to increase but to reduce the burden of the property owner.

We fail to see any force in the contention that the judgment is erroneous because it makes no provision for other creditors. The debtor should hardly be allowed to raise this question when it appears that the amount claimed is due the creditor who has brought the suit. Again, there is nothing to show that the other bonds issued have not been paid, or that there is any other creditor who desires to participate in the fund. If there are other creditors whose claim the appellants are solicitous to have paid, it is fair to presume that respondent will not object to an increase in the amount of the levy so as to meet the other obligations of the district.

The question of laches suggested by appellants is disposed of by the case of *Cahill v. Superior Court*, 145 Cal. 42, [78 Pac. 467]. We think the circumstances detailed in the petition for the writ excuse the delay and show that no prejudice has been caused thereby to appellants.

The court below is directed to modify the judgment by striking therefrom the following: "And when sufficient money is collected, the defendant shall pay to plaintiff from the sum collected whatever amounts are collected in said assessments until said plaintiff shall be paid the said amounts hereinbefore referred to, to wit, the sum of \$12,262.96, together with interest thereon at the rate of seven per cent per annum from the 26th day of August, 1902, and the costs of suit herein," and as so modified the judgment is affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 27, 1907.

[Crim. No. 88. First Appellate District.—June 1, 1907.]

**THE PEOPLE, Respondent, v. WILLIAM H. COLLINS,
Appellant.**

CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF INFORMATION.—An information charging an assault with intent to commit rape upon a female child of the age of six years, which states the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what was intended, is sufficient.

ID.—ASSAULT UPON FEMALE CHILD—ABSENCE OF CONSENT—RESISTANCE BY LAW.—An assault with intent to commit rape upon a female child under the age of sixteen years cannot be by consent, as the law resists for her.

ID.—INTENT TO COMMIT RAPE—CIRCUMSTANTIAL EVIDENCE.—The intent to commit rape need not be proved by direct evidence. It is a question of fact, and may be proved by inference from the acts and conduct of the defendant, and the circumstances of the case.

ID.—COMPETENCY OF WITNESS OF TENDER YEARS—DISCRETION.—The question of the competency of a witness of tender years is one peculiarly within the discretion of the trial court.

ID.—SWEARING OF WITNESS—OBJECTION UPON APPEAL.—Where there is nothing in the record to show that the child was not sworn, and the bill of exception states that she was sworn, and no objection was made to the testimony of the child on the ground that she was not sworn, no objection to her testimony on that ground can be raised for the first time upon appeal.

ID.—EXAMINATION OF CHILD—ADMONITION OF DEFENDANT'S COUNSEL.—During the examination of the timid child, the court properly admonished the defendant's counsel not to stand within the railing, when the child was thereby disconcerted.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

H. A. Krouse, for Appellant.

U. S. Webb, Attorney General, and W. H. Cobb, for Respondent.

COOPER, P. J.—The information charges the defendant with assault with intent to commit rape, the charging part being as follows: "Said William H. Collins . . . unlawfully, violently and feloniously did make an assault upon one Katie Simonetti, a female under the age of sixteen years, to wit, of the age of six years, who was not then or there the wife of said William H. Collins, with the intent then and there feloniously and by force and violence to carnally know and ravish the said Katie Simonetti and accomplish with her an act of sexual intercourse against her will, without her consent and by force, contrary to the form, etc."

Defendant's counsel insists that the information is not sufficient, because it does not allege that the assault was an attempt to commit a violent injury upon the person of the child so as to show an assault as defined in section 240 of the Penal Code.

There was no demurrer to the information, and the point is for the first time raised in this court. However, we are of the opinion that the information is sufficient. It substantially follows the language of the statute, which is: "Every person who assaults another with intent to commit rape, etc." (Pen. Code, sec. 220.) It states the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. In such case the information is sufficient. The word "assault" as used in the statute implies force by the assailant, and resistance by the one assaulted. It has always been held in this state that where a crime like this is charged to have been committed upon a child under sixteen years of age, there can be no consent, as the law resists for her. (*People v. Verdegreen*, 106 Cal. 215, [46 Am. St. Rep. 234, 39 Pac. 607]; *People v. Vann*, 129 Cal. 118, [61 Pac. 776].) It is not necessary for courts to draw fine analytical distinctions between an attempt to commit an offense and an assault with intent to commit such offense. (*People v. Lee Kong*, 95 Cal. 666, [29 Am. St. Rep. 165, 30 Pac. 800]; *People v. Christian*, 101 Cal. 471, [35 Pac. 1043].)

We have carefully examined the evidence, and find it sufficient to support the verdict. Without going into minute detail, there is evidence tending to show the following facts: Defendant roomed on the third floor of a lodging-house at

694 Fourth street, in the city of San Francisco. About 9 o'clock, or a little before, in the evening he was seen going upstairs to his room carrying two little girls in his arms, of which the child upon whom the assault is alleged to have been made was one. He remained in the room for some twenty minutes, and came downstairs with both children in his arms. The child upon whom the assault is alleged to have been made went home, and immediately complained to her mother that the defendant had hurt her, showing the mother her private parts. The mother examined her person, and found the parts red, but did not notice any blood or bruises of any kind. The child testified that defendant got down on his knees, and took up her clothes, and put something in her private parts which hurt her; that he took down her "panties" and took his thing out of his pants; that she was scared, but did not cry, because defendant held her mouth. The police officer to whom complaint was made on the same evening visited the room of defendant at 9:30, and again at 12:30, but did not find defendant there. On the following evening, about half-past 7, he met the defendant and asked him about the matter, and defendant denied that he had the two little girls in his room on the evening of the 8th, or that he was there himself.

Defendant, in his testimony, admits that he had the two little girls up in his room at the time alleged, and attempted to explain it by saying that he took them up to see his own little girl. But as his own wife and little girl were not there at the time, the explanation may very well have been such as not to be believed by the jury.

Defendant further testified as to leaving his room on the evening of the 8th a little before 9 o'clock, and that he went with a Mr. Kaiser to Fifth and Townsend streets, and stayed there until half-past 12 that night, and that at 2 o'clock A. M. he went with Kaiser to Fourth and Bluxome streets. He does not appear to have gone to his room any more that night.

It is argued that as the child had not been torn or penetrated, defendant could not have actually tried to have sexual intercourse with her. What his intentions were was a question particularly for the jury. The jury heard the evidence, saw the witnesses and the defendant when he was tes-

tifying in his own behalf. The facts in this case are very similar to the facts in *People v. Johnson*, 131 Cal. 511, [63 Pac. 842], and that case is direct authority for the view we have taken in this case. It was there said: "The defendant assaulted the child. Being under sixteen years of age she was incapable of consenting, and therefore the assault in law was without her consent. If he had in fact had sexual intercourse with her he would have been guilty of rape. As he did not have sexual intercourse with her, but did assault her, the question as to his intent was to be determined by all the circumstances and by the acts of defendant. The fact that defendant unbuttoned his trousers, that he took out his private parts, and that he wanted to have sexual intercourse with the child, were sufficient to justify the jury in drawing the logical, rational conclusion that defendant's object was to have sexual intercourse with the child. Whether he desisted because he had satisfied his morbid depraved passions in the manner described in the evidence, or because he was afraid of an outcry from the child, or because of his impotence, are all matters of conjecture. We do not think the crime charged against this defendant, and of which he was convicted, is of such a nature that we should attempt to shield him upon imaginary reasons, or upon a theory that might possibly account for his acts as being done with the intent only to gratify an unnatural desire. We must suppose that his acts were done with the purpose and desire that would ordinarily characterize the acts of an individual of the male sex when such acts were done with one of the female sex. That a man should entice a little girl into his room, undress her, and fondle her for the purpose of gratifying an unnatural desire, and not for the purpose of having sexual intercourse, is possible, but not at all probable. The intent of a person cannot be proven by direct and positive evidence. It is a question of fact to be proven like any other fact, by acts, conduct and circumstances."

It is contended that the record does not show that Katie Simonetti was sworn, and further that her examination showed that she was of tender age, and incapable of receiving just impressions of the facts respecting which she was examined, or of relating them truly. The minutes of the trial do not show that she was sworn, but the bill of exceptions

shows that she was examined as to her competency before being sworn, and that after such examination she "was duly sworn." Counsel, in the discharge of their duty, owe it to the court not to raise and discuss a point entirely devoid of merit, especially where the record does not sustain the statement. It is an elementary principle, supposed to be understood by every member of the bar, that if no objections were made to the testimony of a witness, and the testimony was given without the witness being sworn, the objection could not be made for the first time in this court. Here the record does not show that the witness was not sworn, nor that any objection was made to her evidence upon this ground, and the bill of exceptions shows that she was sworn.

Equally without merit is the contention that the court erred in allowing the child to testify. She was carefully examined by the judge, and her examination shows that she was capable of receiving just impressions of the facts, and knew and understood them sufficiently to give her version of them. The question as to the competency of a witness of tender years is one peculiarly within the discretion of the trial court. (*People v. Wilmot*, 139 Cal. 103, [72 Pac. 838]; *People v. Craig*, 111 Cal. 460, [44 Pac. 186]; *People v. Bradford*, 1 Cal. App. 41, [81 Pac. 712].)

It is claimed that "the most glaring and prejudicial error and deprivation of the right to a fair and impartial trial" occurred when the court requested the defendant's attorney not to step within the railing where the little girl was being examined as a witness, and to take his seat. From our information as contained in the record, we are of opinion that the court properly admonished counsel. The child was timid, and both the counsel for the prosecution and the judge were endeavoring to get her to narrate in her own way what occurred. Defendant's counsel had interrupted time and time again with needless objections devoid of merit. Finally, when counsel arose and walked up inside the railing and near the child, the judge informed him that he had "the right to make any objection, but your activity inside the railing disconcerts the witness." It does not appear that counsel could not hear the answers of the witness. The court seems to have been very liberal with him, as he was allowed to ask questions in

cross-examination which take up page upon page of the transcript with no apparent merit.

Many other questions are raised in the brief, but are as devoid of merit as those we have discussed.

The judgment and order are affirmed.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 344. Second Appellate District.—June 1, 1907.]

W. H. HOLMES et al., Appellants, v. SALAMANCA GOLD MINING AND MILLING COMPANY et al., Respondents.

EJECTMENT—UNPATENTED MINING CLAIMS—ISSUES—PLEADING—FINDINGS—ATTACK UPON PLAINTIFFS' DERAIGNMENT—FORFEITURE—RELOCATION.—In an action of ejectment for unpatented lode mining claims, where the complaint tendered the usual issues as to ownership, right of possession and ouster, the defendants, upon issues joined thereupon, were entitled to make any proof which would defeat the plaintiffs' title, and may introduce testimony assailing plaintiffs' deraignment of title, without pleading it, and showing a forfeiture by failure of plaintiffs to do annual assessment work for three years, and a valid location and holding by one of the defendants as a qualified locator without specially pleading it; and findings against plaintiffs' deraignment of title, and establishing plaintiffs' forfeiture of title, and the validity of defendants' relocation and holding upon sufficient evidence, cannot be assailed.

ID.—DEED FRAUDULENTLY OBTAINED.—A deed to the plaintiffs, which was obtained by plaintiffs fraudulently and wrongfully and surreptitiously, without the knowledge, consent, or acquiescence of the grantor, is no more effectual to pass title to them than if it were a total forgery, there being no principle of equitable estoppel applicable to the facts.

ID.—UNDELIVERED DEED FROM CORPORATION TO PLAINTIFFS.—A deed from a corporation to the plaintiffs which was never delivered passed no title to them.

ID.—RELOCATION BY ONE DEFENDANT—PLAINTIFFS' AVERMENT OF POSSESSION BY ALL DEFENDANTS.—Where the formal relocation was made by one of the defendants, but the plaintiffs have made all defendants parties, and aver possession by all of the defendants, a finding as to that effect is supported.

ID.—CORPORATE EXISTENCE OF DEFENDANT.—Where the plaintiffs alleged the corporate existence of the corporation defendant, no proof of its corporate character is required.

APPEAL from an order of the Superior Court of San Diego County, denying a new trial. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

Powers & Holland, for Appellants.

Collier & Smith, Works, Lee & Works, Lawler, Allen & Van Dyke, and C. F. Smith, for Respondents.

ALLEN, P. J.—Action to recover possession of certain unpatented mining claims. Defendants had judgment. Plaintiffs in due time appealed, upon a statement, from the order denying a new trial.

The only questions presented upon this appeal relate to the action of the trial court in admitting certain testimony and as to the sufficiency of the evidence to support certain material findings. The complaint is in the usual form, alleging plaintiffs' ownership, possession and right of possession on December 30, 1903, of three unpatented lode mining claims, designated as the "Bonanza," "Blossom" and "Lucinda," and of plaintiffs' ouster therefrom by defendants. The answer is a denial of the ownership and right of possession in plaintiffs, and of the ouster.

Under these issues the court found that on the date named plaintiffs were not the owners or entitled to the possession of said mining claims, although they were in actual possession; that plaintiffs had not performed the annual assessment work thereon for three years, and that defendants had made valid locations of such claims after forfeiture by plaintiffs and had taken peaceable possession and continued work thereon up to the commencement of the trial.

Plaintiffs deraigned title through mineral locations, the validity of which is not questioned, and through deeds from such locators and intermediate owners. The court, under objections, permitted the defendants to introduce testimony tending to vitiate two deeds affecting plaintiffs' title to the "Bonanza" claim. This action of the court is assigned as error,

because no question of fraud was raised by the answer. The recent decision of *Chrast v. O'Connor*, 41 Wash. 360, [83 Pac. 238], would seem to settle this question adversely to appellants. That decision is based upon *Mather v. Hutchinson*, 25 Wis. 27, where it is held that under a complaint averring ownership in general terms, the defendant must be allowed to prove anything which would defeat the title offered by the plaintiff. The reason assigned is most convincing, for plaintiff not being required to set up his deraignment of title, he might upon the trial prove under such general averment any source of title available. Any other rule applying to defendants would require them to foreknow and avoid, by specific allegations, a title which plaintiff was not bound to disclose at all. This rule has support, also, in *Cooper v. Miller*, 113 Cal. 246, [45 Pac. 325], *Goldberg v. Bruschi*, 146 Cal. 710, [81 Pac. 23], and *Sparrow v. Rhoades*, 76 Cal. 211, [9 Am. St. Rep. 197, 18 Pac. 245].

The court found that the plaintiffs were not the owners or entitled to possession of the mining property on December 30, 1903, nor were they on said date ousted therefrom by defendants. These findings are attacked by appellants upon the ground that there is no evidence in the record sufficient for their support. The findings of the court as to the ownership and right of possession may be sustained upon either of two theories: First, that plaintiffs failed in their deraignment of title from the original locators; or, second, that all rights under the original location had lapsed by reason of the failure to do the annual assessment work required by the federal statutes in order to perpetuate the possessory right, and that defendants exercising a right of citizenship had entered thereon and made a subsequent location before resumption of work by appellants.

The first theory, in so far as the "Bonanza" claim is concerned, derives its support alone from the testimony of one Acosta, which is to the effect that he never knowingly or voluntarily made any conveyance of this mine to plaintiffs, and never knew that he had any title to the mine and never made any claim of ownership thereto; that his only contract with the plaintiffs was that if they would pay him \$400 in settlement of a claim of \$650, which he held against certain trustees, he would give them a receipt in full; that pursuant

to this agreement he went with plaintiffs to the town of Hedges, where several papers were spread upon a counter; that when he signed one, plaintiffs took it away and presented him with another; that in that way he signed two, three, or four papers; that no notary or other officer ever made known to him the contents of the papers so signed, or asked him any questions in relation thereto; that personally he did not know or care what he was signing, but simply wanted to get his money and get away from the mine; that he had never had knowledge of any deed having been made to him by such trustees until he received that information in court upon the trial. If the court accepted Acosta's statements as true, which fact is suggested by the findings, it would follow that the possession of the deed from Acosta was obtained by the plaintiffs surreptitiously. A deed, the possession of which is fraudulently or wrongfully obtained from the grantor, without his knowledge, consent or acquiescence, is no more effectual to pass title to a supposed grantee than if it were a total forgery. (Devlin on Deeds, sec. 267, and cases cited.) The validity of the deed from Acosta to plaintiffs depends upon his due execution thereof and voluntary delivery. That such deed be voluntary, it is essential that the character of the instrument be known, as well as that the act of delivery should be intended by the party. If the delivery be not voluntary, the instrument is a nullity, unless some act is shown in respect thereto which would estop the grantor from denying its validity, or by some subsequent act a ratification is established. There is nothing in the record from which it may be claimed that plaintiffs were, by the conduct of Acosta, led to do what they otherwise would not have done to their pecuniary prejudice—this being said to be the vital principle of equitable estoppel. (*Carpy v. Dowdell*, 115 Cal. 677, [47 Pac. 695].) If Acosta's statements be true, under the contract with plaintiffs the payment of the \$400 made by plaintiffs was not upon the faith of any conveyance, nor was it intended that a conveyance should enter into the transaction connected with the payment of money to him. Neither can it be said that, with knowledge of the transaction brought home to him, Acosta ever acquiesced in said deed or ratified the same.

As to the "Blossom" mine, the record discloses that the title thereto was never in Acosta; that as early as 1891 the owners of said mine joined in a conveyance of the "Blossom" mine to a corporation known as the Blossom Mining and Milling Company. If the plaintiffs ever acquired any title to this particular mine, it was through a conveyance directly to them by the Blossom Mining and Milling Company, authorized by the board of directors in 1902. It appears from the testimony of the secretary that, notwithstanding the authorization at the date last named and the physical signing of the deed pursuant thereto by the president and secretary of the corporation, the secretary retained possession of the deed, and put the same in the minute-book of the corporation, where it remained until long after the commencement of this action, when the officers acknowledged the same and it was placed upon record. From this evidence the court was justified in an implied finding that the conduct and acts of the parties in 1902 did not amount to a delivery, nor does it appear from the record that an immediate delivery was intended, notwithstanding the secretary was also one of the grantors; nor is there anything shown indicating that plaintiffs ever paid to the corporation anything of value for this property, or ever acquired any equitable interest therein.

As to the "Lucinda" claim, nothing appears in the record supporting plaintiffs' claim of ownership and right of possession. If, therefore, these plaintiffs, without color of title entered into the possession of any of these mineral claims without relocation or initiating any right thereto, the same were open to relocation at any time after the legal owners were in default in the annual assessment work. It is contended, however, by appellants that evidence of the non-performance of the annual assessment work was inadmissible because no claim of forfeiture was alleged in the answer. Under a general denial or its equivalent, each party to a contested action claims the title out of which the right of possession springs, and the court determines which of the two holds it. (*Marshall v. Shafter*, 32 Cal. 197.) It must be conceded that if the defendants' title is in issue, they are entitled to prove those facts which tend to support it, and it is essential in determining defendants' ownership in the case at bar for the court to know whether or not the mineral

ground which they claim to have relocated and own was at the date of relocation open thereto. Section 2324, Revised Statutes of the United States, [U. S. Comp. Stats. 1901, p. 1427], provides that, upon a failure to comply with the conditions relative to the annual assessment work, the claim or mine "shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." There is little room for controversy as to the default upon the part of the owners under the original location in the performance of the annual assessment work for the three years preceding the relocation. Whoever were the successors to the ownership of the original locators, if they failed for three years to perform the annual assessment work, the mines and claims became open to relocation. It is determined in *Contreras v. Merck*, 131 Cal. 214, [63 Pac. 336], that the principal fact at issue was the ownership of the mine; that it was not necessary for plaintiffs to allege forfeiture or abandonment by defendants. If this be the rule, as applying where the issue of ownership is raised by the answer with the presumptive denial upon the part of plaintiff, no reason is apparent why the same should not apply to the issues raised by a complaint and answer. If the original locator, or his successors in interest, be in default in such annual assessment work, they are no longer the owners of the exclusive possessory right; and the defendant should be permitted to show that such exclusive possessory right has terminated, and that after such termination he peaceably entered upon the premises and relocated the same. The mere naked possession of mineral land does not guarantee any rights as against a subsequent locator entering in good faith and making a valid location of the property. (*Horswell v. Ruiz*, 67 Cal. 112, [7 Pac. 197].)

It is further claimed by appellants that there is no evidence connecting any of the defendants, other than Clark, with the relocation, or title to these claims. We think this point need not be considered further than to suggest that the plaintiffs have made all of these defendants parties, and have alleged that they had ousted plaintiffs from the possession, and were the present occupants of the premises. They allege

that the Salamanca Gold Mining and Milling Company is a corporation, and no finding in that regard was necessary.

A careful examination of the record convinces us that there is no prejudicial error apparent therein, and the order is affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 280. Second Appellate District.—June 3, 1907.]

J. C. WILLMON, Appellant, v. GEORGE H. PECK et al.,
Respondents.

SPECIFIC PERFORMANCE—DEFINITE DESCRIPTION OF LAND—PAROL EVIDENCE—NEW DESCRIPTION.—In an action for the specific performance of a contract for the sale of lots, where the description in the contract is definite, certain, and complete, and described land not belonging to the defendants, parol evidence is inadmissible to show that the contract was intended to describe lands elsewhere situated belonging to the defendants by a new and wholly distinct description, which is sought to be made the subject of the action.

ID.—DISREGARD OF PAROL EVIDENCE ADMITTED—FINDING.—Where the court improperly admitted parol evidence to supply a new and distinct description of land, such evidence was entitled to no weight whatever, and the court properly disregarded it, and found that the contract was fatally defective for want of description of the land claimed in the action to be covered thereby.

APPEAL from a judgment of the Superior Court of Los Angeles County. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

Harris & Harris, for Appellant.

Frank Karr, and Wellington Clark, for Respondents.

SHAW, J.—Plaintiff appeals from a judgment rendered in favor of defendants in an action for the specific performance of a contract to purchase real estate.

At the time of the transaction, George H. Peck was the owner of the east half of the only block numbered 61 located in the city of San Pedro, which east half of said block comprised lots 7 to 12, both inclusive. Neither defendant had or claimed any interest in the west half of said block, which comprised lots 1 to 6, both inclusive. It appears from parol testimony that sometime prior to February 3, 1903, the date of the alleged purchase, a real estate broker, as the agent of said George H. Peck, and at his request, made a rough pencil sketch of said east half of said block 61, showing the same to be divided into lots numbered 1 to 14, both inclusive, which sketch was shown to said George H. Peck and posted in his office. This sketch or subdivision of the east half of said block was exhibited to the plaintiff by said agent, who pointed out to him upon the ground that portion of said east half of said block corresponding to lots designated as 5 and 6 upon said rough pencil sketch so made by said agent. This sketch was never filed for record, nor was it produced at the trial, though the said agent then made and exhibited a copy of said sketch as nearly as he could reproduce the same, which, like all of the foregoing parol testimony, was received in evidence over the objections of the defendants. No survey was ever made of the east half of said block for the purpose of subdividing it. It was agreed between plaintiff and said agent acting for defendant George H. Peck that plaintiff would purchase lots 5 and 6, as designated on said pencil sketch; whereupon plaintiff gave to said agent his check, payable to said George H. Peck, for \$100, as a deposit upon the purchase price of said lots, which check said Peck received and cashed, and thereupon delivered to said plaintiff a receipt reading as follows:

“San Pedro, Feby. 3rd, 1903.

“Received from J. C. Willmon one hundred dollars part payment on lot 5 & 6, block 61, San Pedro. Full price \$1500.00.

“GEO. H. PECK.”

Plaintiff thereafter tendered the balance of the purchase price and demanded a conveyance of lots 5 and 6, as designated upon said so-called subdivision of the east half of block 61, which deed also described said lots by metes and

bounds; and upon a refusal of said demand brought this action.

Both the check and the receipt describe the property sold as being "lots 5 and 6, block 61, City of San Pedro," both of which lots are in the west half of said block, and neither of which was owned by either of the defendants. The lots involved in this action are admittedly not the ones so described, but are lots 5 and 6 as delineated upon the alleged pencil sketch of what was represented to plaintiff as being Peck's subdivision of the east half of block 61; and while the trial court permitted parol evidence tending to prove that the lots sold were other than those so described in the writing, it, in effect, found that such evidence was valueless; and as a conclusion of law the court found, inasmuch as parol testimony could not be received for the purpose of supplying the description of real estate in the contract for the sale thereof, that said contract was fatally defective for want of description of the lands claimed to be covered thereby, and that said defects could not be supplied by parol evidence. In making this finding the court arrived at the same result, though in a roundabout way, as though it had excluded the testimony in the first instance. The evidence was improperly admitted, and having been admitted, "it was entitled to no weight whatever, and should be given none in arriving at a conclusion as to the sufficiency of the evidence." (*Hoult v. Baldwin*, 78 Cal. 410, [20 Pac. 864].)

The conclusion of the trial court was undoubtedly correct. The land described in the receipt, lots 5 and 6, block 61, in the city of San Pedro, is situated in the west half of said block; but it was not these lots, the conveyance of which the plaintiff sought to enforce, but other lots situated in the east half of said block, and which he sought to identify and describe by parol testimony. The law seems well settled that, in order to warrant the specific performance of a contract for the conveyance of real property, the agreement to convey must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. (*Marriner v. Dennison*, 78 Cal. 208, [20 Pac. 386]; *Craig v. Zelian*, 137 Cal. 106, [69 Pac. 853].) Where there

is an incomplete description, parol evidence not inconsistent therewith may be offered in aid thereof, not, however, for the purpose of introducing a new description. Thus, where the subject of a contract of sale was a certain quantity of fruit from sundry orchards in Ontario and Cucamonga, parol evidence was held admissible to identify the orchards. (*Ontario etc. Assn. v. Cutting F. P. Co.*, 134 Cal. 21, [86 Am. St. Rep. 231], 66 Pac. 28.) Here the description in the contract is definite, certain and complete, and it is sought by parol evidence to show that the subject of the contract was entirely a different piece of land. This would be in violation of express statutory provision. (Civ. Code, sec. 1741.) "It must, of course, appear from the memorandum what is the subject matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified." (Browne on Statute of Frauds, sec. 385; *Ferguson v. Blackwell*, 8 Okla. 489, [58 Pac. 649].)

The judgment is affirmed.

Allen, P. J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 1, 1907.

[Civ. No. 343. Second Appellate District.—June 3, 1907.]

J. H. KEIFER, Appellant, v. R. H. MYERS, Respondent.

TRANSFER OF STOCK—RIGHT TO REPURCHASE—PLEDGE.—Where it appears that a transfer of one-half of the stock in a corporation by plaintiff to defendant was contemporaneous with a right given to repurchase the same, that the stock had a substantial value, and that defendant neither paid nor agreed to pay anything in consideration of its transfer to him, that none of plaintiff's existing liabilities as a stockholder were canceled or assumed by defendant, and as a condition of the retransfer plaintiff was to pay one-half of the money which a bank had loaned or would loan the company, further security being given for future loans to the company,

the transfer of the stock is to be deemed a pledge and not a sale thereof.

ID.—AGREEMENTS—SINGLE TRANSACTION—LANGUAGE OF SALE NOT CONTROLLING.—The agreements whereby the stock was transferred to the defendant and the plaintiff was given the right of repurchase constituted one and the same transaction, and are to be taken together in view of all the circumstances of the case. The use of the words "Sold, transferred, and assigned," and the recital that defendant is the owner of the stock cannot change the character of the transaction. For the purpose of ascertaining the real contract between the parties, the court looks beyond the terms of the instrument.

ID.—ACTION TO REDEEM FROM PLEDGE—NONSUIT.—In an action to redeem from the pledge, a motion for a nonsuit admitted the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom. *Held*, that a motion for a nonsuit, in view of the evidence for plaintiff, was improperly granted, and that the judgment of nonsuit must be reversed.

APPEAL from a judgment of the Superior Court of Los Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Lynn Helm, and E. S. Williams, for Appellant.

W. R. Hervey, and R. H. Myers, *in pro. per.*, for Respondent.

SHAW, J.—Appeal from a judgment of nonsuit.

At the time in question the Sanitary Laundry Company was a corporation with a capital stock of \$40,000, divided into four hundred shares of the par value of \$100 each. Of this stock the appellant, J. H. Keifer, owned one hundred and ninety-eight shares, one George R. Myers owned one hundred and ninety-eight shares, and the remaining four shares were owned by three other persons, who, with said Keifer and said George R. Myers, constituted the board of directors of said corporation. The corporation was in financial distress, and it appears that neither appellant nor said George R. Myers was in a position to extend it the aid needed. The appellant had borrowed from the Broadway Bank and Trust Company \$4,500, evidenced by two promissory notes,

and as security for their payment had, in addition to giving a mortgage upon certain real estate owned by him, deposited his one hundred and ninety-eight shares of stock in pledge with said bank as collateral security. The laundry company was largely indebted to said George R. Myers for moneys which he had loaned it. Under these conditions, the respondent R. H. Myers and J. H. Keifer entered into negotiations, which, on December 30, 1903, culminated in a transfer of respondent's one hundred and ninety-eight shares of stock to said R. H. Myers, and contemporaneously therewith the execution of an agreement in writing wherein it was recited that said Keifer had sold, assigned and transferred to R. H. Myers one hundred and ninety-eight shares of stock and that R. H. Myers was the owner and holder thereof; that said stock was pledged to said bank as additional security for the payment of a certain promissory note of \$4,500, executed by said J. H. Keifer and his wife, which said note was also secured by a mortgage of real estate; that said laundry company during the time said Keifer was a stockholder had become largely indebted to George R. Myers for moneys by him loaned to said company; that said R. H. Myers had loaned and advanced, and would thereafter loan and advance, divers sums of money to discharge a part of the indebtedness of the said company in order to save it from bankruptcy, and to pay such of the operating expenses as might be necessary for the best interests of the company; that said Keifer desired an option to purchase one hundred and ninety-eight shares of said stock, and wherein said R. H. Myers covenanted and agreed to sell to said Keifer, within one year, time being made the essence of the contract, one hundred and ninety-eight shares of said stock, upon Keifer making payment to R. H. Myers of: 1. All moneys paid to said bank by R. H. Myers on account of the notes of said Keifer, for the payment of which said stock was held as collateral security; 2. One-half of all moneys theretofore or thereafter, up to the exercise of the option, advanced to said company by R. H. Myers, less any payments made thereon by said company; 3. One-half of all moneys theretofore loaned to said laundry company by said George R. Myers, less any payments made thereon by said company; and 4. Interest on said sums at seven per cent per annum. It was further

provided that an accounting for any dividends paid upon said stock should be made and credited to said Keifer at the time of his exercising said option to purchase. R. H. Myers covenanted to advance to the company from time to time such sums of money, not exceeding \$4,000, as might be necessary to save the company from bankruptcy. At the same time, and with the consent of appellant, an agreement in writing was made between said bank and said R. H. Myers, whereby the bank agreed to deliver the one hundred and ninety-eight shares of stock so pledged to it by Keifer to the said R. H. Myers at any time upon his paying the sum of \$1,000, to be applied on Keifer's indebtedness to said bank, and the delivery to the said bank of an agreement on the part of R. H. Myers to pay any deficiency, not exceeding \$750, which might remain upon Keifer's notes after exhausting the real estate so held by it as security for the payment thereof.

It will be noted by this agreement with the bank, R. H. Myers assumes no obligation whatever. There was no other consideration for said transfer than that mentioned in the agreement. It appears that R. H. Myers did pay upon said indebtedness of Keifer the sum of \$714.92, and no more, and that from the proceeds of the real estate so held by the bank the sum of \$2,540 was paid on the principal, together with \$260 interest thereon. From time to time after December 29, 1903, which was the date of both the agreement made between Keifer and Myers and that between Myers and the bank, though neither was delivered until the 30th of December, 1903, R. H. Myers advanced to said laundry company divers sums of money, part of which was paid by said company. Keifer did not exercise his option to repurchase the stock within the year, but on January 24 and January 27, 1905, he offered to repurchase and redeem said stock under the terms of said agreement, and asked respondent to render him a statement and account of the amount due thereon, which he, in writing, tendered and offered to pay. No objection was made to this tender. Respondent claimed that the transaction constituted an absolute sale, and that appellant, having failed to exercise his option within the year, had lost the right to purchase the stock. On the other hand, appellant contends that the transfer was a pledge of stock.

"The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendant." (*Hanley v. California etc. Co.*, 127 Cal. 232, [59 Pac. 577]; *Goldstone v. Merchants' etc. Storage Co.*, 123 Cal. 625, [56 Pac. 776].)

The record shows that the agreements dated December 29, 1903, were delivered on the following day, on which date the certificate of stock representing the one hundred and ninety-eight shares of stock which Keifer had pledged to the bank was withdrawn and a new certificate for said stock issued to R. H. Myers and by him redeposited with said bank. The agreement whereby Keifer was given the right to repurchase the stock and the transfer of the stock to R. H. Myers constituted one and the same transaction. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially the one transaction, are to be taken together. (Civ. Code, sec. 1642.)" (*Curtin v. Ingle*, 137 Cal. 95, [69 Pac. 836].) It appears that R. H. Myers paid no consideration whatever for the transfer of the stock; that he assumed no obligation whatever to pay anything upon Keifer's indebtedness to the bank, nor did he secure the release of Keifer's obligations as a stockholder of the company, or assume or agree to pay them. If the company failed to pay George R. Myers, Keifer was still liable for his proportion of its indebtedness, notwithstanding the loss of his stock. There was no cancellation or surrender of the evidence of any of Keifer's indebtedness. The only obligation assumed by R. H. Myers was to advance money to the company only in case it became necessary to save the company from bankruptcy. Such contingency might never arise, but if any advances were made, it was provided that Keifer should pay one-half thereof upon a repurchase of the stock. If Myers was the owner of the stock instead of the pledgee, as he claims, the covenant was an obligation to protect his own property and not Keifer's—a proposition which borders upon absurdity.

The fact that the agreement giving Keifer the right to repurchase and the transfer of the stock were contemporaneous (*Weiseham v. Hocker*, 7 Okla. 250, [54 Pac. 464]; *Clark v. London*, 90 Mich. 83, [51 N. W. 357]; *Watkins v. Williams*,

123 N. C. 170, [31 S. E. 388]); that the stock had a substantial value and Myers neither paid nor agreed to pay anything in consideration of its transfer to him (*Husheon v. Husheon*, 71 Cal. 407, [12 Pac. 410]; *Rubo v. Bennett*, 85 Ill. App. 473); that none of Keifer's existing liabilities were canceled and Myers assumed no part thereof under the terms of the agreement; that as a condition of a retransfer Keifer was to pay one-half of the company's unpaid indebtedness to George R. Myers and one-half of the money which respondent had loaned the company, which shows that to this extent at least the stock was transferred as security (Civ. Code, secs. 2986, 2987) for existing debts of the company, for a part of which Keifer was liable (*Ahern v. McCarty*, 107 Cal. 386, [40 Pac. 482]; *Farmer v. Grose*, 42 Cal. 169); that no fixed price was specified as a consideration for the repurchase, but the amount was to be as much as would reimburse R. H. Myers for one-half of such sums as he might advance and which might remain unpaid, including one-half of the amount due from the company to George R. Myers; that Keifer was chargeable with interest and to be credited with dividends—all are circumstances which tend, some of them very strongly, to prove that the transfer was a pledge and not a sale of the stock.

Respondent lays much stress upon the words used in the agreement, but the use of the words "sold, transferred, and assigned," and the recital that Myers is the owner of the stock, cannot change the character of the transaction. For the purpose of ascertaining the real contract made by the parties, the court looks beyond the terms of the instrument. (*Hodgkins v. Wright*, 127 Cal. 688, [60 Pac. 431].).

The judgment is reversed.

Allen, P. J., and Taggart, J., concurred.

[Crim. No. 83. First Appellate District.—June 4, 1907.]

THE PEOPLE, Respondent, v. GEORGE MEYERS, Appellant.

CRIMINAL LAW—GRAND LARCENY—SUPPORT OF VERDICT.—Where, upon the trial of a charge of grand larceny, there was legal evidence tending to prove the charge, the verdict of conviction is absolutely final, and cannot be reviewed upon appeal on the sole ground of insufficiency of the evidence to support the verdict.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

E. W. Rowland, and J. J. Earle, for Appellant.

U. S. Webb, Attorney General, for Respondent.

KERRIGAN, J.—Defendant was charged with the crime of grand larceny, and upon the trial was found guilty. His motion for a new trial was denied, and appeal is taken from the judgment and from the order denying such motion.

The sole point made by the appellant is that the verdict of the jury is entirely unsupported by the evidence.

Briefly, the testimony is as follows:

Mrs. Grace Hopkins testified: "On the evening of November the 23d, 1905, at about midnight, in front of a hotel on Mason street in San Francisco, I saw Arnold, Noelke and defendant Meyers, all strangers to me. These three men and myself, at the invitation of Arnold, went into a saloon near by, and had several drinks of whisky, the last of which looked smoky. At that time I had \$48 in a purse in my stocking, and on my fingers three diamond rings worth \$125, \$90 and \$60, respectively. While in the saloon, in attempting to remove my glove, Arnold saw my rings and made a grab for my hand. I withdrew my hand and replaced my glove." She further testified: "I remember nothing that happened

for several hours after my drinking that smoky liquor. The next thing that I recollect is awakening in a filthy room in which I had never been before. I was in bed and not entirely dressed, but my clothes had been loosened; my dress was open; my corset strings had been cut and the corset removed and thoroughly searched; my shoes and stockings were on the floor and had been carefully examined, even the soles of the shoes having been inspected. My rings were not to be found, and on the dresser I discovered my purse inverted and empty."

The defendant George Meyers testified: "I am one of the defendants charged jointly with Arnold and Noelke. I have known Noelke for some time; I first met Arnold on the night of November 23, 1905. Noelke introduced us. About half-past one in the morning of November 24, 1905, the three of us were standing on Mason street in front of the Alturas, where Noelke lived, when Mrs. Hopkins passed by. She was intoxicated and asked us, 'Which of you is going to buy me a drink?' Arnold said that he would do so, and started down the street with her. Noelke and I followed, and the four of us went into a saloon near the Linwood. Arnold sat next to Mrs. Hopkins at the table. We had several drinks, but I did not notice any that appeared cloudy or smoky. We left the saloon about 2:30 A. M. and went into the Linwood, Arnold and Mrs. Hopkins leading the way. Arnold went to the desk and engaged a room, and the night clerk took him and Mrs. Hopkins up in the elevator. Arnold motioned to Noelke and me to remain in the office, and we did so. Later I took Noelke home to the Alturas; he was quite drunk. When I left him there he said to me: 'Arnold has a good job at the Park, and I'd hate to see him lose it on account of a woman. Don't let him oversleep, but send him out to work.' I returned to the Linwood, inquired of the clerk the number of the room occupied by Arnold and Mrs. Hopkins, and having been refused the key went upstairs and pounded on the door to arouse Arnold. This I was doing as an accommodation to my friend Noelke, as I had no interest in Arnold, having only met him the night before. Before I had received any response from Arnold I was compelled to desist by the night clerk, who told me that I was disturbing the whole house. I returned to the office, but presently

went upstairs again hoping that I might awaken Arnold, renewed the knocking at the door less violently than before, and was asked by Arnold what I wanted. I told him to get up; that it was time for him to go to work, and he said, 'All right; I'll be out in a minute.' I waited for him; presently he came out and asked me to go with him and have a drink; and we left the Linwood together. I had not entered the room occupied by Arnold and Mrs. Hopkins since she went up with Arnold in the elevator. I did not take or assist in taking any property from her person. On leaving the Linwood Arnold and I had a drink together, and he then asked me if I was acquainted at any pawnshop in the city. I said that I knew a clerk at a place on Kearny street, and Arnold asked me to take him there, and said that his girl had given him some things to pawn for her. So I went with him to Jacobs', and there he pawned three rings for \$100. I had never seen the rings before that moment, and had no idea where he obtained them, except from his statement that his girl had given him some articles to pawn. We left the pawnshop together and had another drink. We then separated, and I do not know what Arnold did during the rest of the day. After that I saw Arnold nearly every day until we were arrested, about a week later. We were arrested by Officer Ryan, with whom I subsequently talked once or twice about the case. His account of our conversations was in the main correct. I never received any money from Arnold on account of the deal between him and the pawnbroker, nor on any other account; and I never said that I did."

Charles Clark testified: "I was on duty as night clerk at the Linwood Hotel on Mason street at about 2 o'clock, November 24, 1905, when Mrs. Hopkins, Arnold, Noelke and defendant Meyers arrived. Arnold came to the desk and engaged a room. I asked him his name, and he replied: 'Any old name; say Burke.' The room I assigned them was on the second floor. I entered the elevator to take the party up. Arnold and Mrs. Hopkins stepped in, and Noelke and Meyers started to follow when Arnold motioned them to stay back, and they retired. They remained in the office while I took the others upstairs. Mrs. Hopkins remarked while in the elevator that the place was 'dirty' and 'a pretty poor looking dump.' I showed them to the room, and saw them

enter and shut the door. The door locked with a snap lock. I then returned to the office where Noelke and Meyers were waiting. They remained for some time, then went out and returned. Noelke was quite drunk. At about 5:30 o'clock Meyers and he went outside, and Noelke did not return. Meyers returned in a few minutes. He said something about getting Arnold up and sending him to work. He learned which was his room and then ran upstairs. He asked me for the key of the room, which I refused to give him, as Arnold had given me particular instructions not to allow anyone to enter the room. Presently I heard a terrible racket upstairs. I went up and found Meyers in the hall outside of the door of the room which I had given to Arnold and Mrs. Hopkins; he was pounding and kicking on the door. I forced him to stop and to go down to the office with me as he was creating a sufficient disturbance to arouse the whole house. Presently Meyers went up again and made a good deal of noise, but was not quite so boisterous as on the former occasion, so I did not disturb him this time. I do not know whether he was in the room on these several trips or not. Presently he and Arnold came down together and left the hotel at about half-past 7."

H. Wilkins and A. E. Trimple testified that they were clerks at the Jacobs pawnshop; that they knew Meyers; that on November 24, 1905, at about 8 o'clock in the morning, Meyers and another man, whose name was given as Burke, called at the pawnshop, and Burke pawned three diamond rings for \$100.

It is conceded that it was Arnold under the name of Burke who pledged the diamond rings.

James L. Ryan, a member of the detective force of the city and county of San Francisco, testified that Meyers told him that he (Meyers) had received from Arnold a commission of \$15 out of the \$100 in the pawnshop transaction.

If there was no legal evidence to support the verdict of the jury in this case, as is contended by appellant, then there would be presented a question of law upon which, of course, this court would have jurisdiction to pass. The record, however, shows clearly there was legal evidence to prove all the facts constituting the crime alleged. In such a case the decision of a jury, in so far as this tribunal is concerned, is

absolutely final. (Const., art. VI, sec. 4, amended Nov. 8, 1903; *People v. Maroney*, 109 Cal. 279, [41 Pac. 1097]; *People v. Fitzgerald*, 138 Cal. 41, [70 Pac. 1014]; *People v. Donnelly*, 143 Cal. 398, [77 Pac. 177]; *People v. Gonzales*, 143 Cal. 606, [76 Pac. 962].)

In *People v. Maroney*, 109 Cal. 279, [41 Pac. 1097], it is said: "The power of a jury in determining the weight to be given to testimony is, within the rules of evidence, exclusive and supreme, and appeals to this court in criminal cases do not lie from the verdict of the jury upon controverted questions of fact, but solely upon propositions of law."

In *People v. Fitzgerald*, 138 Cal. 41, [70 Pac. 1014], it is said: "By the constitution appellate jurisdiction is conferred upon this court in 'criminal cases prosecuted by indictment or information in a court of record on questions of law alone.' Where there is evidence, therefore, to sustain the verdict, a question of law cannot arise, but only in a case where there is in effect an entire lack of evidence."

The judgment and order are affirmed.

Cooper, P. J., and Hall, J., concurred.

[Civ. No. 397. Second Appellate District.—June 4, 1907.]

JOHNSON W. SUMMERFIELD, Petitioner, v. HERBERT G. DOW, Auditor of Los Angeles County, Respondent.

JUSTICES OF THE PEACE—SALARIES IN LOS ANGELES TOWNSHIP.—

Under the act of March 18, 1907, establishing a new system of county and township governments, by amendments of the Political Code, the four justices of the peace provided for in Los Angeles township, in section 4114 thereof, are, by the provisions of subdivision 15 of section 4231 thereof, each entitled to receive a salary of \$3,000 per annum, payable in like manner and out of the same fund and at like times as county officers.

1D.—CONSTITUTIONAL LAW—COMPENSATION IN PROPORTION TO DUTIES.—

Such provision does not violate section 5 of article XI of the state constitution, requiring the compensation of officers to be regulated in proportion to duties. The adjustment of compensation by salaries in large cities, and fees in smaller cities, towns, and nonurban communities, proceeds upon intrinsic differences.

PETITION for writ of mandate to the auditor of Los Angeles County.

The facts are stated in the opinion of the court.

C. L. Shinn, for Petitioner.

Anderson & Anderson, for Respondent.

TAGGART, J.—Petition for writ of mandate. Petitioner is a justice of the peace for Los Angeles township, Los Angeles county. Respondent is the auditor of Los Angeles county.

On May 11, 1907, petitioner demanded of respondent that he draw a warrant upon the treasurer of Los Angeles county for \$250, payable to petitioner as his salary for the month of April, 1907, under the provisions of subdivision 15 of section 4231 of the Political Code as amended March 18, 1907. (Stats. 1907, p. 424.) Respondent refused to issue said warrant, and, as cause why the mandate of this court should not issue commanding him to do so, says the statute providing for such salary is unconstitutional.

The provision of the constitution said to have been violated by the legislature in enacting the section mentioned is the requirement of section 5 of article XI that "It [the legislature] shall regulate the compensation of all such officers [county, township and municipal officers] in proportion to duties," etc. Section 4014 of the Political Code, as amended in 1907, provides for two justices of the peace in each township of the state; provided that in townships containing cities in which city justices or recorders are elected and in townships having a population of less than five thousand there shall be but one, and provided further that in townships containing a population of more than one hundred thousand and less than three hundred thousand there shall be four justices of the peace.

Subdivision 15 of section 4231, which relates to the compensation of justices of the peace in counties of the second class (Los Angeles), provides that justices of the peace shall receive as compensation "such fees as are now or may be hereafter allowed by law; provided that no justice of

the peace shall receive more than \$1,500 per annum, which may be paid in monthly installments of not exceeding \$125 per month for all services rendered by him in criminal cases . . . or proceedings to which the People of the State of California are parties. . . . And provided further, that in townships having a population of more than one hundred thousand and less than three hundred thousand each justice of the peace shall receive a salary of three thousand dollars per year, payable in like manner and out of the same fund and at like times as county officers are paid, and such salary shall be in lieu of all fees due or to become due such justice for performance of any official act. And all fees . . . shall be and become the property of the county in which such justice exercises his jurisdiction." Another proviso requires the board of supervisors of the county to provide an office and necessary furniture therefor and appoint a clerk for each of said four justices' courts; and a salary of one hundred dollars per month is provided to be paid to each of said clerks.

Los Angeles township is the only one in Los Angeles county to which the provisions as to clerks, salary, offices, etc., can apply, and it is contended, first, that the compensation provided is not in proportion to the duties that the respective justices of that township may be required to perform; and, second, that when compared with the compensation fixed for justices of the peace in other townships of Los Angeles county, the salary allowed is not in proportion to the duties of the office.

While it is possible, we might even say probable, judging from human nature in the average, that some of the justices of the township in question will perform more of the duties of the office than others, we do not think this is a failure of uniformity of operation which can be reached in this manner. This presents one of those evils of our governmental system which must find relief at the ballot-box. A statute which provides four officers to attend to all the business of a specified kind within a certain district at equal salaries impliedly imposes a duty upon these officers to equitably apportion the business among them, whether there be any express statutory regulations in this regard or not. Any inconvenience to the public from the overzeal of one or more of the incumbents of the office of justice of the peace to do too

much (or too little) will have to be borne until the opportunity arises to change the personnel of the offices. That a more excellent system was provided for San Francisco by the Code of Civil Procedure (sec. 85 et seq.) does not imply that the latter is the only constitutional plan. The validity of a law is not to be tested by its application to extreme cases, or by assuming that public officers will grossly and arbitrarily violate their duties. If every law were declared unconstitutional which by the application of such tests could be shown capable of working injustice, we would have very few laws left. (*Rode v. Siebe*, 119 Cal. 520, [51 Pac. 869].)

The greater stress, however, is laid upon the objection that there is not a due apportionment of duties and compensation between the justices outside of Los Angeles city and those inside.

The path of judicial interpretation through the field of county and township legislation discloses many byways. Conflicting views are not wanting in the various declarations of the law on the subject by the courts. But we are not called upon to distinguish these cases, nor to attempt to reconcile them in reaching a conclusion on this point.

The two cases relied upon by respondent to sustain his position that the law is unconstitutional (*Tucker v. Barnum*, 144 Cal. 266, [77 Pac. 919]; *Millard v. Kern County*, 147 Cal. 682, [82 Pac. 329]) hold that a classification of townships by population for the purpose of fixing the compensation of the officers thereof, according to the method prescribed by the constitution for classifying counties, is valid and proper.

In *Tulare County v. May*, 118 Cal. 308, [50 Pac. 427], it is held that different methods of fixing compensation of county officers may be provided in different counties. In *Vail v. San Diego Co.*, 126 Cal. 35, [58 Pac. 392], the same doctrine is declared and rule applied where a county officer in one class of counties was compensated by salary and the same officer in all the other classes of counties in the state received fees and a *per diem* for services rendered. This rule is recognized and applied to township officers in two different classes of counties in the later case of *Johnson v. Gunn*, 148 Cal. 745, [84 Pac. 665].

In *Tucker v. Barnum*, *supra*, the unequal limitations upon the fees that might be collected for the same services was de-

clared to violate the rule that compensation must be in proportion to duties, and also to violate the rule as to local and special laws affecting the fees and salaries of officers.

The act before the court in *Millard v. Kern County*, *supra*, was declared invalid on the authority of the former case, and was subject to the same objection when considered independent of the provision relating to the justices of the peace to whom were given a fixed salary for all services in civil and criminal cases. The section classifying townships and fixing the compensation of the justices of the peace was considered as an indivisible act, and on the theory that one part could not be permitted to stand without the other, the decision in that case may be sustained. This view of the opinion in that case is supported by the fact that no attempt is made to point out the differences between the two cases, and the decision in the Millard case is rested solely upon the rule of *stare decisis*. This is also further strengthened by the special concurring opinion of Justice Angellotti in the later case. These cases are easily distinguishable from the case at bar. Subdivision 15 of section 4231 does not in express words classify the townships of Los Angeles county. It fixes a uniform rule of compensation by fees for all the justices of the peace in the county, with a limitation of \$1,500 per annum in criminal cases, and, by a proviso, establishes salaries for the four justices of the peace provided for one of the classes of townships created by the general law. (Pol. Code, sec. 4014.) Both the other classes created by section 4014 receive the fees allowed by law, with the same limitations in criminal cases. The legislature in its discretion has fixed a different mode of compensation in the two classes created by the legislation for the purpose of fixing compensation, and there is nothing before this court from which it can ascertain whether the compensation of one class will be less or more than the other.

Conceding full force and effect to all that has been said since *Longan v. Solano Co.*, 65 Cal. 122, [3 Pac. 463], in regard to compensation being fixed in proportion to duties rather than according to population, and the same rules of interpretation of statutes are applicable. The mode and measure of compensation of public officers are both peculiarly matters of legislative discretion, and an act of the legislature

in relation thereto ought to be clearly shown to be unconstitutional before being so declared by the courts. The validity of statutes should not be determined upon mere possible contingencies. So long as the classification seems based upon conditions which suggest the propriety of the different adjustments made between the classes, and the adjustments proceed upon intrinsic differences, and are not based upon mere arbitrary distinctions, it should be upheld. (*Vail v. San Diego Co.*, 126 Cal. 35, [58 Pac. 392].)

While the population of a township may not alone be sufficient to determine the duties required of an officer, density of population has always been regarded as one of the prime considerations in ascertaining the amount of compensation to be paid a public officer for discharging the duties of his office, and also in determining the system to be adopted in measuring such compensation. Salary is the method most generally adopted to compensate officers of large cities, and fees those of smaller cities and towns and nonurban communities. The adjustment between the classes in the act under consideration appears to proceed not only upon intrinsic differences existing between the townships of the respective classes, but is based upon well-recognized distinctions, which go directly to the duties required of such officers, and to the methods of compensation ordinarily and generally used. To sustain respondent's position here would be to hold any act unconstitutional which provided fees as the measure of compensation in one class of townships and salaries in another. We find no authority to sustain such a position.

We are of the opinion that the legislature did not violate its legislative discretion in enacting the portion of subdivision 15 of section 4231 of the Political Code as amended in 1907 which fixes the salary of the justices of the peace of Los Angeles township at \$3,000 per annum for the personal discharge of their official duties. In arriving at this conclusion, however, we have not considered those provisions relating to salaries of clerks, office rent, supplies, etc., as affecting the compensation of the justices of the peace. These are matters which naturally suggest questions which have not been presented on this application. For instance, the question of whether or not it is competent to create special township officers for one class of townships in one county (that

is, clerk of the justice's court), under a classification of such townships by population for the purpose of fixing compensation. Neither have we considered the proviso as to rent, furniture, supplies, etc., because we deem it unnecessary to the decision of the question raised on this application. The legislature has made express provision for a salary of \$3,000 for the justices of the peace in Los Angeles township, and petitioner is entitled to receive the salary of \$250 per month as demanded. The writ of mandate of this court is directed to issue commanding respondent to draw his warrant upon the county treasurer of Los Angeles county for the amount as prayed for.

Shaw, J., and Allen, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 3, 1907.

[Civ. No. 367. Second Appellate District.—June 5, 1907.]

In the Matter of the Estate of LOUISIANA R. LONG, Deceased. E. R. FOX, Appellant, v. J. R. TOBERMAN, and J. C. KAYS, Executors, Respondents.

ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—FAILURE OF PURCHASER TO COMPLY WITH TERMS—RESALE—DISCRETION.—If, after the confirmation of a sale of the real estate of a deceased person, the purchaser who had made a small cash payment neglected and refused to comply with the terms of sale, the only reason offered being that owing to the condition of the money market, he was not able to raise the balance of the purchase money, the court had discretion, upon application of the executors, to set aside the sale and order a resale of the property, and the exercise of its discretion will not be disturbed upon appeal.

APPEAL from an order of the Superior Court of Los Angeles County setting aside a sale of real estate of a deceased person, and ordering a resale. G. A. Gibbs, Judge.

The facts are stated in the opinion of the court.

L. M. Fall, and E. R. Fox, for Appellant.

Frank James, for Respondents.

SHAW, J.—This is an appeal from an order of the court setting aside a sale of certain real estate belonging to the estate of Louisiana R. Long, deceased, and ordering a resale of the property.

The only facts material to the case are, that on March 6, 1906, appellant in open court bid \$15,400 cash for certain real estate belonging to the estate of deceased upon condition that he should be furnished an unlimited certificate of title showing the property entirely clear of all liens or clouds. The bid was accepted, appellant paid \$1,550 on account of the purchase price, and thereupon the court made its order confirming the same. Thereafter, on July 20, 1906, pursuant to notice duly given, respondents moved the court to set aside the sale so made to appellant and order a resale of the property, the grounds of the motion being that said appellant had neglected and refused to pay the balance of the agreed purchase price of the property. The hearing of this motion was, at the request of appellant, continued from July 20th to August 10th, on which last-mentioned date the court made the order setting aside the sale, and from which this appeal is prosecuted.

Sometime in June, 1906, there was delivered to appellant a certificate of title executed by the Title Insurance and Trust Company of Los Angeles, and appellant then accepted the title to the property as shown by this certificate, provided the respondents, who were the executors of the estate of said deceased, would credit him on his bid with the sum of \$63 paid on a street improvement bond; to all of which the executors consented and agreed. A tender of the deed and a demand for the balance of the purchase price was admitted. The only objection urged against granting this motion was the condition of the money market, Fox stating that he was not able at that time to raise the balance of the purchase price; whereupon the court, at his request, continued the hearing to August 10, 1906, at which time the order granting the motion was made.

Section 1554, Code of Civil Procedure, provides: "If, after the confirmation, the purchaser neglects or refuses to

comply with the terms of the sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property." Under this provision of the statute, the making of the order was a matter solely within the discretion of the court. The record discloses no abuse of discretion; indeed, the circumstances would seem to permit no other course than that pursued.

After the order was made appellant filed an affidavit, which purported to embody his objections to the granting of the motion. This affidavit was, by an order of the court made October 12, 1906, stricken from the files. No appeal was taken from this order, and neither the affidavit nor the ruling of the court in striking it from the files can be considered on this appeal, which was taken some three weeks prior to said October 12th.

The order appealed from is affirmed.

Allen, P. J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 3, 1907.

[Civ. No. 339. First Appellate District.—June 5, 1907.]

FRED DODD, Respondent, v. H. C. PASCH and ROBERT PASCH, Copartners Under the Firm Name of PASCH BROS., Appellants.

LEASE—FIXED TERM—SPECIFIED RENTAL—PARTIAL RECEIPT—CONSTRUCTION.—A lease bearing date September 25, 1905, and acknowledging receipt from the lessees named of \$20 on account of "old Schien store, at a monthly rental from Oct. 1, of \$125 per month for first six months, i. e., to April 1st; of \$75 per month for the remainder of the year closing Oct. 1, 1906; \$105 due and payable," and signed by the lessors, under which the lessees entered October 1, 1905, and paid, is by its terms a fixed lease for one year. The fact that it is in part a receipt is immaterial.

ID.—PAROL EVIDENCE—TENANCY FROM MONTH TO MONTH.—Parol evidence is inadmissible to vary the terms of such lease by showing that

it was leased from month to month, and that the lessor terminated it by notice.

ID.—ESSENTIALS OF LEASE.—The only essentials of a lease are that it shall clearly show the names of the contracting parties, premises leased, the rental, and the term.

ID.—TIME OF PAYMENT OF RENT NOT ESSENTIAL.—The time of payment of the rent need not be specified in the lease, for when not stated nor governed by usage, it is fixed by law, by the terms of section 1947 of the Civil Code.

ID.—SIGNATURE OF LESSEES NOT ESSENTIAL—ACCEPTANCE.—It is sufficient that the lease is signed by the lessor. The signatures of the lessees are not essential; but they manifest their acceptance of the lease by entering under it and paying the rent.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Johnston & Jones, and W. P. Thompson, for Appellants.

Lewis H. Smith, for Respondent.

HALL, J.—Appeal from judgment and order denying defendants' motion for a new trial.

Plaintiff brought this action to recover the possession of certain premises rented of plaintiff by defendants. The complaint was framed upon the theory that the defendants were tenants from month to month and were holding over after one month's notice terminating their tenancy. Defendants pleaded that they leased the premises for one year ending October 1, 1906, and at the trial introduced in evidence in support thereof a writing signed and delivered to defendants by plaintiff in the words following, to wit:

"Fresno, Cal., Sep. 25, 1905.

"Received of Pasch Bros. Twenty and no/100 dollars on a/c of old Schien store at a monthly rental from Oct. 1, of \$125.00 per month for first 6 months, i. e. to April 1st; of \$75.00 per month for the remainder of the year closing Oct 1, 1906. \$105 (one hundred and five) due and payable.

"\$20 no/100.

FRED DODD."

Defendants went into possession October 1, 1905, and paid all rent up to March 1, 1906, at which time they tendered the rent for March, which was refused by plaintiff, he having on February 28th given defendants a notice to surrender possession March 1, 1906.

The trial court, over the objection and exception of defendants, permitted the plaintiff to give testimony of an oral agreement to the effect that he leased the premises sued for, known as the old Schien store, to defendants from month to month, although he admitted that he executed and delivered to defendants the writing above set forth, and that the money specified had been paid.

The court made findings in accord with the theory of plaintiff, and gave judgment accordingly.

Defendants contend that the writing above set forth constituted a written contract of lease for the term of one year ending October 1, 1906, and that no evidence of any oral agreement contrary to the terms thereof was admissible.

Of the correctness of this contention we have no doubt. The instrument clearly shows the contracting parties, the premises leased, the rent and the term, which is clearly one year, ending October 1, 1906. These are all the essential requisites of a lease that need be specified in the contract of lease. Other conditions usually contained in leases are non-essential. The time of payment even need not be specified, for when not stated in the lease nor governed by usage, it is fixed by the law. (Civ. Code, sec. 1947.)

"To constitute a lease no particular form of words is necessary. Whatever words show an intention on the part of the lessor to dispossess himself of the premises, and on the part of the lessee to enter and hold in subordination to the lessor's title, are sufficient." (18 Am. & Eng. Ency. of Law, 605.)

Munson v. Wray, 7 Blackf. (Ind.) 403, was an action against Mrs. Munson for holding over her term as tenant, brought on the theory that she was a tenant at will or at sufferance. Defendant (Mrs. Munson) gave in evidence an instrument in writing signed by the complainant as follows: "Rec'd of Mrs. Munson \$3.50 for rent of my brick house in Covington for one month, with privilege of keeping it six months at the same rate. No. 91 or 95. Dec'r 1st, 1843,"

and proved that it had reference to the premises sued for. The court held it a good lease and that the lessee could not be dispossessed, if she paid the rent, until the expiration of the six months.

In *Eastman v. Perkins*, 111 Mass. 30, a writing at the foot of a receipted bill for hay in these words: "Left at stable on Oak street, where Andrew J. Perkins takes possession. Rent to begin October 1, 1870, for one year at \$150. John C. Hoadley," was held to be a good lease. The court said: "The memorandum affixed to the bill of parcels expresses the consent of the owner that the defendant should have immediate possession of the stable, and should continue to occupy it at a specified rent and for a definite time. Although brief and informal therefor, it had all the essential elements of a present demise (citing cases). Being accepted by the defendant, it gave him all the rights of a lessee."

In the case at bar, defendants, by paying the rent and entering into possession of the premises, accepted the lease. It was not necessary for the lessee to sign the lease. (Johnson on Landlord and Tenant, sec. 77; Taylor on Landlord and Tenant, sec. 147; 18 Am. & Eng. Ency. of Law, 606; *Castro v. Gaffey*, 96 Cal. 421, [31 Pac. 363]; *Scott v. Glenn*, 97 Cal. 513, [32 Pac. 573].) The instrument in question being a valid lease, and unambiguous as to the term of the tenancy, it was error to allow oral evidence that the tenancy was from month to month. (Civ. Code, sec. 1625; *McDonald v. Poole*, 113 Cal. 437, [45 Pac. 702].)

The cases relied on by respondents on this question are not in point. In *Kreuzberger v. Wingfield*, 96 Cal. 251, [31 Pac. 109], the writing relied on was a mere memorandum so vague and uncertain as not to constitute a contract at all.

The case at bar was not an attempt to explain a clause or term susceptible of two different interpretations (*Williams v. Ashurst*, 144 Cal. 619, [78 Pac. 28]), or to prove a collateral parol agreement not inconsistent with the writing (*Sivers v. Sivers*, 97 Cal. 518, [32 Pac. 571]; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786]), but a bald attempt to contradict the terms of the written contract.

Neither can the action of the trial court be sustained on the theory that the writing was a receipt, for while it is a re-

ceipt, it is also something more. It is a contract of lease of the premises described for the term of one year.

The judgment and order are reversed.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 372. Second Appellate District.—June 5, 1907.]

**KATE BEKINS, Appellant, v. MINNIE DIETERLE and
WILLIAM DIETERLE, Respondents.**

FRAUDULENT CONVEYANCE—HUSBAND AND WIFE—SUPPORT OF FINDINGS.—In an action by a wife to have her title quieted against judgment creditors of the husband, who are selling his property under execution, where the court finds, upon sufficient evidence, that on the day on which their judgment was rendered, he transferred property purchased with community funds in a large sum to the wife, for a nominal sum, and had the deed recorded in her name, with intent to hinder and defraud the judgment creditors of the husband, the findings in their favor will not be disturbed.

ID.—FRAUDULENT INTENT—OTHER PROPERTY IMMATERIAL.—Where fraudulent intent is found upon sufficient evidence, the conveyance is void as to existing creditors, and the question whether the debtor has other property is immaterial.

ID.—PRESUMPTION OF SEPARATE PROPERTY FROM DEED TO WIFE NOT CONCLUSIVE.—The presumption arising under the amendment of 1889 to section 164 of the Civil Code, that property conveyed to the wife is her separate property, cannot be deemed conclusive, and may be overcome by proof that the purchase was made with community funds. In such case the property remains the property of the husband, and is liable for the community debts.

ID.—EARNINGS OF WIFE PART OF COMMUNITY PROPERTY.—The earnings of the wife are as much part of the community property as are the earnings of the husband.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

J. Marion Brooks, F. B. Guthrie, and Henry E. Wills, for Appellant.

E. W. Freeman, and A. D. Laughlin, for Respondents.

SHAW, J.—Appeal from judgment in favor of the defendants, and from an order denying plaintiff's motion for a new trial.

The appellant, Kate Bekins, is the wife of M. Bekins. On December 29, 1896, Minnie and William Dieterle commenced an action against M. Bekins to recover damages for the conversion of certain personal property alleged to have been delivered to him for storage in his warehouse, and which property he refused to redeliver to the plaintiffs in said suit on demand therefor. The judgment rendered in favor of M. Bekins on the first trial was reversed (*Dieterle v. Bekins*, 143 Cal. 683, [77 Pac. 664]), and upon a second trial, had on December 23, 1904, judgment was rendered in favor of plaintiffs therein. Execution was issued and placed in the hands of the sheriff, who duly levied upon certain real estate as belonging to M. Bekins, the judgment debtor, and proceeded to advertise the same for sale; whereupon Kate Bekins, the appellant, who claimed ownership of the property, instituted this action to enjoin the sheriff from selling the same and have her alleged title thereto quieted as against Minnie and William Dieterle.

It appears that the real estate, which is of the value of \$34,500, was conveyed to M. Bekins on October 31, 1904, and stood in his name until December 23, 1904, when, for a stated consideration of \$10, he executed a deed therefor to his wife, Kate Bekins, and without other delivery to her, filed the same for record at 1:40 P. M. of said day. The consideration paid for the property when conveyed to M. Bekins was \$34,500. This amount was paid by checks drawn upon money on deposit to the credit of Kate Bekins, who testified that she "drew it from the moneys of the Bekins Van and Storage Company." At the date of the conveyance from M. Bekins to his wife he had no other property out of which the judgment could be made. During all of the times covered by these several transactions M. Bekins was engaged in the van and storage business, and Kate Bekins, in addition to caring

for her household duties, assisted him in the active management and conduct of said business. At the date of her marriage appellant had only \$100, which, she says, was long ago expended. The business was incorporated subsequently to the date of the commencement of respondents' suit against M. Bekins, and the husband placed some of the stock in the name of appellant, the reason for his doing so being unknown to her. There was other testimony to show that M. Bekins, after the commencement of suit by respondents, turned his property over to his wife when he was sick, and, as her attorney testified, "she has been the man of the family."

The court found that the property levied on was community property; that the consideration for the purchase thereof, \$34,500, was paid out of community funds; that the deed dated December 23, 1904, whereby M. Bekins, in consideration of \$10, conveyed the property to his wife, Kate Bekins, was intended by M. Bekins to hinder, delay, and defraud his creditors, and especially the respondents herein; that at the time of making said conveyance M. Bekins had no other property out of which respondents' judgment could be made.

Appellant attacks all of these findings, asserting that they are not justified by the evidence. Section 162, Civil Code, defines the separate property of the wife as being "all property owned by her before marriage, and that acquired afterward by gift, bequest, devise or descent, with the rents, issues and profits therefrom." Section 163, Civil Code, likewise defines the separate property of the husband. All other property than that designated in said sections 162 and 163, acquired after marriage "by either husband or wife, or both, is community property." (Civ Code, sec. 164.) As this last section stood prior to the amendment of 1889, property conveyed to the wife during coverture was presumed to be community property. (*Morgan v. Lones*, 78 Cal. 58, [20 Pac. 248]; *Davis v. Green*, 122 Cal. 364, [59 Pac. 9].) As such it was under the control of the husband and might be mortgaged by him or subjected to the payment of his debts regardless of the fact that it stood of record in the name of the wife. (*Davis v. Green*, 122 Cal. 364, [59 Pac. 9]; *Schuyler v. Broughton*, 70 Cal. 282, [11 Pac. 719].) This presumption could be overcome by evidence that the consideration paid for the property was the separate funds of the wife. The amendment of 1889 changed this presumption by adding

the following provision to section 164: "But whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." This presumption, like the one existing before the amendment, is not conclusive, but may be overcome by extrinsic evidence showing the consideration for the property to have been paid out of the community funds; and when such fact is established the property, notwithstanding it stands in the name of the wife, is subject to the control of the husband and is liable for the community debts. The presumption of a separate estate created in Kate Bekins by the conveyance from M. Bekins is overcome by the evidence, which clearly shows the property to have been purchased with community funds. She testifies: "I drew it (the \$34,500 paid for the lots) from the moneys of the Bekins Van and Storage Company." "It was taken out of the business of the Van and Storage Company." The consideration paid for the property did not represent the earnings of the wife, but of the community business. The fact that she, as the "man of the family," had active charge of the business did not affect its character as community property. Besides, her services and earning power were as much a part of the marital community capital as that of the husband. "The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband." (*Martin v. Southern Pac. Co.*, 130 Cal. 285, [62 Pac. 515]; *Smith v. Furnish*, 70 Cal. 424, [12 Pac. 392].) The evidence justified the court in finding that the real estate levied on was community property.

The evidence in support of the finding that the conveyance was made with intent to defraud Minnie and William Dieterle is likewise sufficient. The uncontradicted facts are that judgment was rendered against M. Bekins on December 23, 1904, on the afternoon of which day he, unknown to his wife, voluntarily and without consideration therefor (other than \$10) executed and filed for record a deed which purported to convey property of the value of \$34,500, and which appellant testified was all the property he owned. Is not the inference from these facts irresistible that he intended to place the property beyond the reach of respondents' judgment? No

rational mind could reach any other conclusion than that found by the court. (*Judson v. Lyford*, 84 Cal. 505, [24 Pac. 286].)

Section 3439, Civil Code, provides: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." The court found that prior to the execution of the deed in question respondents were creditors of M. Bekins, and that the transfer of his property to his wife was made with the intent to hinder, delay and defraud them in the collection of their claim. Under these findings the conveyance was void as against respondents, and as to their judgment the title and ownership of the property remained in M. Bekins as fully as though no transfer had been attempted. "A void thing is as no thing." The deed was a nullity. "As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution." (1 Freeman on Executions, sec. 136.) In *Bull v. Ford*, 66 Cal. 176, [4 Pac. 1175], the court, in discussing a transfer made with fraudulent intent, said: "The conveyance to defendant being void, as against Alvarado's creditors, the creditors were authorized to levy upon and sell the property as if no conveyance had ever been made by their debtor." (*Judson v. Lyford*, 84 Cal. 505, [24 Pac. 286]; *First Nat. Bank v. Maxwell*, 123 Cal. 360, [69 Am. St. Rep. 64, 55 Pac. 580]; *Hemenway v. Thaxter*, 150 Cal. 737, [90 Pac. 116]; *Bull v. Bray*, 89 Cal. 300, [26 Pac. 873].)

The intent to defraud existing creditors being established, the question as to the debtor having other property becomes immaterial for the reason that the attempted transfer as to such creditors is void. "Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm anyone, by reason of the fact that the debtor has other property ample in amount within the reach of his creditors." (2 Bigelow on Fraud, p. 393.) "A rich man may make a fraudulent deed as well as one who is insolvent." (*Hager v. Shindler*, 29

Cal. 60.) It therefore follows that the ruling of the court in permitting respondents to file an amendment to their answer pending trial, whereby they alleged the insolvency of M. Bekins, was at most harmless error. Adopting appellant's view of its importance, it was clearly within the discretion of the court and no abuse of discretion appears. In support of her contention that it must be shown that the debtor had no other property, not only at the time of the transfer, but at the time of the levy of execution thereon, appellant cites *Albertoli v. Branham*, 80 Cal. 631, [13 Am. St. Rep. 200, 22 Pac. 404], which seems to support her contention. The point involved there, however, was the sufficiency of the allegations of an answer which did not allege the transfer to have been made without consideration, nor that the debtor did not have other property sufficient to satisfy his debts. The learned judge who wrote that opinion made no reference to section 3439, Civil Code. In our judgment, it is opposed to direct statutory provision contained in section 3439, Civil Code, and contrary to later judicial expression of the supreme court wherein it is held in substance (*First Nat. Bank v. Maxwell*, 123 Cal. 360, [69 Am. St. Rep. 64, 55 Pac. 580]): If the fraudulent intent is found to exist, the conveyance is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors.

The judgment and order are affirmed.

Allen, P. J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 3, 1907.

[Civ. No. 275. First Appellate District.—June 6, 1907.]

**ROBERT WHITTLE, Respondent, v. ANNIE WHITTLE,
Sued as ANNE WHITTLE, Appellant.**

HUSBAND AND WIFE—DESEDITION—USE BY WIFE OF HUSBAND'S MONEY FOR SUPPORT—ACTION FOR RECOVERY NOT MAINTAINABLE.—A husband is bound to support his wife, and where he has deserted her without just cause, and provides her with no means of support, she is entitled to use the money of the husband, which comes lawfully in her hands, with which to provide herself with the necessities of life, and in such case equity and good conscience will not permit the husband to recover the money from her as had and received to his use.

ID.—TRIAL—PLEADINGS MISSING FROM FILES—PRACTICE.—Where at the trial the pleadings are missing from the files, the correct practice would be either to find the originals, or supply copies. Where they appear in the record, no injury appears in causing the trial to proceed without their presence.

ID.—ACTION FOR MONEY HAD AND RECEIVED—STATUTE OF LIMITATIONS.—An action for money had and received dates only from receipt of the money, and the fact that it was received upon a note since outlawed cannot affect the statute of limitations.

ID.—NOTE PAYABLE TO HUSBAND AND WIFE—SUIT BY HUSBAND—DEFENSE—PAYMENT TO WIFE—FORMER JUDGMENT NOT A BAR.—Where the note was payable to both husband and wife, and in a former suit thereon by the husband to collect the note, in which the wife was made a defendant, a defense by the payee that he had paid the note to the wife as one of the payees, in which judgment was given to the wife, such former judgment cannot constitute a bar to an action by the husband against the wife for money had and received.

ID.—EQUITABLE DEFENSE TO MONEY HAD AND RECEIVED.—The general principle is that in an action of money had and received the defendant may show any facts that entitle him to retain the money on legal or equitable ground, and if the right of the defendant to retain the money is equal to that of the plaintiff, the defendant must prevail. In an action by the husband against the wife for money had and received, it was error to refuse to allow her to prove in defense that the husband had willfully deserted her, without just cause, and that the money received was necessarily expended by her for the necessities of life.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

J. C. Bates, for Appellant.

P. J. Mogan, and M. S. Eisner, for Respondent.

COOPER, P. J.—The complaint alleges that the plaintiff and defendant are husband and wife, but that they have been living separate and apart since August, 1893; that in November, 1893, the defendant received \$1,097.60 to and for the use of plaintiff; that said money was partly the separate property of plaintiff and partly community property, and that defendant has not paid the same nor any part thereof.

The answer alleges that all the money received by the defendant was received by her as the wife of the plaintiff, and was necessarily used by her for the necessities of life, for her board and maintenance, after plaintiff had willfully deserted and separated from her without just cause.

The cause was tried, findings filed, and judgment thereupon entered for plaintiff.

This appeal is from the judgment and the order denying defendant's motion for a new trial.

Several errors are assigned and argued in appellant's brief, which we will notice in the order in which they are discussed.

It is claimed that error was committed in trying the case without the pleadings being before the court. It appears from the bill of exceptions that the plaintiff's attorney stated to the court that the papers in the case were missing from the files, but that he had copies that he could supply in case the originals were not found. Defendant's attorney objected to proceeding with the case until the original papers were produced or other papers substituted in lieu thereof. The court overruled the objection, and the trial proceeded. The correct practice would have been to find the originals or supply copies before the trial of the case, but that may have been done. The pleadings are now here as a part of the record, and it does not appear that they are not the original documents, nor does it appear that they were not found and used during the trial. No further question appears to have been raised concerning them, and no injury to defendant is made to appear.

The plaintiff offered in evidence a note for \$924.60, dated February 19, 1891, made by Mary D. Carpenter and payable to plaintiff and defendant. To this the defendant objected upon several grounds, among others that it was not admissible under the pleadings, and that it appeared to be barred by the statute of limitations. The court overruled the objection. The ruling of the court was not erroneous. The complaint alleges that the money was received from Mary D. Carpenter. The note was only used to refresh the memory of defendant, who was being examined as a witness for plaintiff. She was asked if she collected any part of the said note, and she answered that she did collect one-half of it—\$462.30—about November 3, 1893. This was the basis of the judgment entered up for plaintiff. The question under investigation was as to the fact of defendant receiving the money, and the date when it was received.

The defendant, by way of estoppel, offered in evidence the judgment and judgment-roll in a former suit in the superior court of the city and county of San Francisco, in which the present plaintiff was plaintiff, and the present defendant and Mary D. Carpenter were defendants, the action being to recover judgment upon the promissory note hereinbefore referred to. The court sustained the plaintiff's objection to said judgment-roll, to which ruling the defendant excepted, and now claims that the court erred in so doing. Without regard to the question, discussed in the briefs, as to the estoppel not having been pleaded in the answer, we are of opinion that the judgment was not admissible. The former suit was between the same parties, but the question involved and the issue under investigation was not the same. That was an action to recover the amount of the promissory note against Mary D. Carpenter, the maker thereof. The present defendant was made a defendant in the former action because, as alleged, she would not consent to become plaintiff. She was one of the parties to whom the note was payable, and no judgment was asked against her. The court in the former suit found that defendant Mary D. Carpenter had paid the said note to this defendant. Judgment was accordingly entered for the defendants in such former suit. The fact that it was adjudged and declared in such former suit that the plaintiff could not recover upon the note, for the reason that the maker of the note had paid it to one of the payees, was not an

adjudication that the plaintiff could not maintain an action against the joint payee who had received the money. Upon discovering that the note had been paid to defendant, he had the right to bring an action for money had and received to his use. The statute of limitations in such case would not begin to run until the money was received by defendant. In order to constitute an estoppel the former judgment must have been between the same parties, in the same right, in regard to the same subject matter, and must necessarily have involved the determination of the same fact, to prove or disprove which it is introduced in evidence. (*Laguna Drainage Dist. v. Charles Martin Co.*, 5 Cal. App. 166, [89 Pac. 933].)

We come now to the important question in the case, and the one which, in our view, necessitates a reversal. The answer, as has been shown, alleges that the money was received by the defendant as the wife of the plaintiff, and had been used by her for the necessities of life after the plaintiff had deserted her and left her without means. In receiving the money defendant was guilty of no wrong. The note by its terms was payable to her as one of the payees. She received it as lawfully as if she had received it from the hands of her husband. She had the right to use it, because she was the wife of the plaintiff, and he was liable for her support and maintenance, and had left her without means. While the defendant was upon the stand as plaintiff's witness, and after she had testified to receiving the money, her counsel asked her in cross-examination what she did with it. Counsel for plaintiff objected to the question on the ground that it was incompetent, irrelevant and immaterial, and not cross-examination. The court sustained the objection, to which defendant's counsel duly excepted.

After the plaintiff rested, the defendant took the witness-stand in her own behalf, and was again asked by her counsel the same question. The same objection was made as to the competency, relevancy and materiality of the question, followed by the same ruling. She was then asked if she was living with plaintiff, and if the plaintiff had contributed anything to her support for the past eight years. These questions were objected to by the plaintiff as being incompetent, irrelevant and immaterial, and the objections were sustained. The ruling was thus clearly made that the defendant could not show that she had used the money for the necessities of

life after the plaintiff had willfully deserted and abandoned her, leaving her without means. It appears clear to us that if the money had come into the hands of the defendant while plaintiff and defendant were living together as husband and wife, and that the plaintiff, during the time they were so living together, necessarily used the money for the family, or for the necessities of life, the plaintiff could not recover. There is no difference in principle between the facts of the present case as alleged in the answer. The defendant, although deserted, was still the wife of plaintiff. In law she was part of his family. He had not been released from the legal obligations resting upon him. He could not, by wrongfully deserting the defendant, take advantage of his own wrong. He certainly ought not to be in a better legal position by reason of his desertion than he would be if still living with defendant. By the marriage plaintiff contracted the obligation of supporting defendant. (Civ. Code, secs. 155, 174.) It was said by the supreme court in *Galland v. Galland*, 38 Cal. 266: "Amongst other rights secured to the wife is the right to be suitably supported and maintained by the husband according to his means and station. If he fails or refuses to provide such support for her, the law authorizes her to purchase from others, on the credit of her husband, whatever is necessary for her maintenance and suitable to her station in life. There can be no diversity of opinion on this point, which is thoroughly well settled." If the law authorizes the wife, in case of the failure of the husband to provide for her, to purchase from others, and holds him responsible, is there any reason in law or morals why she could not use the money in her hands for the same purpose? Can it be said that the husband in such case may recover the money from the wife, and then in turn the merchant who furnishes her with the necessities, recover from the husband? In *Livingston v. Superior Court*, 117 Cal. 633, [49 Pac. 836], it was held that, under section 155 of the Civil Code, where a husband has no separate property, and there is no community property, and the husband is unable, by reason of infirmity, to support himself, an action would lie to compel the wife to support him out of her separate property. In that case, *Galland v. Galland*, *supra*, is approved and followed and the statutory liability of the husband and wife discussed. It thus appears beyond question that if the answer is true,

the plaintiff was liable for the support of the defendant. The action for money had and received lies to recover money to which plaintiff is entitled, and which in justice and equity the defendant ought to refund to the plaintiff, and which defendant cannot with a good conscience retain. (Bouvier's Law Dictionary, under heading "Money had and received," and authorities cited; *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, [59 Pac. 568, 825].) It was held in the latter case that the plaintiff could not recover money which had been paid to defendant in good faith but upon a void contract. That in equity and good conscience the plaintiff was not entitled to the money, although the defendant could not in law have recovered the money upon the illegal contract.

The general principle is that in this kind of action the defendant may show any facts that entitle him to retain the money, either upon legal or equitable grounds. The right of the defendant need not necessarily be better than that of the plaintiff. If it is equal thereto, the defendant must prevail. (4 Wait's Actions and Defenses, p. 511, and cases cited; Boone on Code Pleading, sec. 171.)

Our conclusion is that the defendant had the right to show by way of defense that she was the wife of the plaintiff; that plaintiff had deserted her, leaving her without means; that the money came lawfully into her possession, and was necessarily used by her for her support and maintenance. In such case equity and good conscience will not permit the plaintiff to recover.

The views herein expressed make it unnecessary to pass upon other questions argued in the briefs. The judgment and order are reversed.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 845. Second Appellate District.—June 7, 1907.]

**HERCULES OIL REFINING COMPANY, Appellant, v.
GEORGE HOCKNELL et al., Respondents.**

CORPORATIONS—LIABILITY OF DIRECTORS—MISAPPROPRIATION OF MONEY BY PRESIDENT NOT PROVED—NONSUIT.—The liability of the directors of a corporation for misappropriation of money by the president of the corporation is limited strictly to money proved to have been misappropriated by him; and in an action by the corporation to enforce such liability, where the evidence fails to show that the president misappropriated any moneys belonging to the corporation, a nonsuit was properly granted.

APPEAL from a judgment of the Superior Court of Los Angeles County. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

E. B. Drake, and Jones & Drake, for Appellant.

A. M. Cates, and George A. Corbin, for Respondents.

TAGGART, J.—This is an action to recover from defendants, as directors of the corporation plaintiff, moneys of the corporation alleged to have been embezzled and misappropriated by an officer of the corporation during the term of office of said directors. The officer who was charged with the misappropriation (defendant Hocknell) was not before the court, but the other defendants appeared and defended, and as to them, and each of them, the court granted a motion for a nonsuit.

Plaintiff appeals from the judgment and presents a bill of exceptions on the ruling of the court granting the nonsuit.

The charge against Hocknell, as president, rests upon the following facts, to wit: On November 25, 1902, the board of directors of plaintiff adopted a resolution authorizing and empowering the defendant, B. L. Vickrey, as secretary of the company, to sell and dispose of all the remaining treasury stock of plaintiff (being 130,000 shares of the par value of \$1 per share) at the best price obtainable in the market.

November 26, 1902, thirteen certificates (Nos. 1718 to 1730, inclusive) of said stock for 10,000 shares each, were issued to C. Walton Cannon, a broker in New York City, and forwarded to him for sale. He did not sell any of the stock, but under date of August 31, 1903, an entry was made in the books of the company by the bookkeeper, at the direction of Hocknell, in the name of W. H. Cannon (conceded to be intended for C. Walton Cannon): "To Capital Account, 130,000 shares of the capital stock of Hercules Oil Refining Company, two cents; See Minutes of meeting of Board of Directors, 11, 25, 1902, \$2,600.00."

Hocknell procured the stock certificates from Cannon personally while in New York City at least as early as June 15, 1903, and "when he returned from the east" told the secretary of the company that he (Hocknell) had bought the stock at two cents a share and "turned in \$2,600 for the stock." He did not say who he bought it from, but the secretary (who was empowered to sell) testified that he considered he (the secretary) had sold the stock to Hocknell at two cents per share, that being the best price obtainable at the time, and because the company needed the money. He further testified: "I felt I was doing the company a favor to get two cents for the stock," and that "there would soon be an assessment on the stock of ten or fifteen cents a share." There was no transfer of any of the Cannon stock to Hocknell on the books of the corporation.

In the latter part of 1902, or the first of 1903, Hocknell sold to Alexander Campbell 25,000 shares of the capital stock of the Hercules Oil Refining Company, and received \$5,000 cash therefor. On June 15, 1903, Hocknell forwarded from Ocean Park three certificates of stock, one (No. 1762) for 7,105 shares in the name of George Hocknell, two (1718 and 1719) for 10,000 shares in the name of Walter Cannon. Later, September, 1903, three certificates in the name of Campbell for 5,000, 10,000 and 10,000 shares, respectively, were substituted for the original certificates.

About the same time Campbell purchased, Fred A. Pennell also bought from Hocknell 1,000 shares for which he paid \$200 cash, and by letter dated at Ocean Park on June 15, 1903, received a certificate for it in the name of George Hocknell. Later on, September 10, 1903, he received a certificate in his own name in lieu of the Hocknell one.

Thomas B. McPherson, on October 25, 1901, bought 6,250 shares of stock from George Hocknell and paid him \$1,250 for them, and again on the twenty-third day of January, 1903, made another purchase of a similar amount for the same price. The first certificates of stock sent to him were in his name, and bore date September 3, 1903. Each block of stock was paid for on the date of its purchase.

Mr. J. W. Hupp bought 10,000 shares of stock from Hocknell and paid \$2,000 cash for them, but does not give the date of purchase. The stock certificate was issued in his name and received about September 6, 1903. The circumstances appear to justify the inference that this purchase was made about the same time that Campbell and Pennell purchased.

All of these purchasers bought from Hocknell and knew nothing, apparently, of whether the stock purchased was treasury stock or stock belonging to Hocknell. The evidence does not disclose how much of the residue of the 600,000 shares of the capital stock of the corporation was held or owned by Hocknell, either at the time of sale or the time of delivery of the stock sold by him. The books of the company show that the certificates for the 48,500 shares issued to these four purchasers in their respective names in September, 1903, were all by transfer and cancellation of the Cannon certificates to that amount, and that the residue of the 130,000 shares, 81,500 shares, was sold to one B. M. Freese. The latter sale is not material to this action.

The time at which the secretary accepted Hocknell's declaration that he had bought the stock, at a sale thereof, is stated with much uncertainty in the testimony. "Sometime in July, if I remember correctly," and "after he returned from the east with the stock," cover Mr. Vickrey's recollection of the matter. The letter from Hocknell to Campbell shows he had the Cannon certificates at Ocean Park as early as June 15, 1903, and was assuming to deal with them as his own. There was nothing on the books of the company until August 31, 1903, to show that he (or anyone else) had bought them.

It is admitted that the motion for a nonsuit was properly granted upon the first cause of action, which counted on a participation of the other defendants with Hocknell in the transactions complained of, but appellant claims that there

was a sufficient showing made of the liability of the defendants other than Hocknell, under section 3 of article XII of the constitution of the state of California to avoid the granting of a nonsuit as to such defendants on the second cause of action.

The section of the constitution invoked merely makes the directors sureties for their fellow-directors and for the officers of the corporation for "moneys," when so misappropriated as to make the officer misappropriating liable, and authorizes the creditors and stockholders to sue, etc. The section is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss. But the liability created is that of suretyship, in which the innocent always suffers for the guilty, and therefore the surety may always stand upon the very letter of his bond. For this reason the liability must be limited strictly to moneys misappropriated. (*Winchester v. Howard*, 136 Cal. 444, [89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77].)

The allegation of the complaint is to the effect that said defendant Hocknell did, on or about January 15, 1903, misappropriate the sum of \$8,730 of plaintiff's funds.

The evidence to support this shows that in the latter part of 1902, or the first part of 1903, Hocknell received from Campbell \$5,000, from Pennell \$200 and from Hupp \$2,000. That he received \$1,250 from McPherson in October, 1901, and \$1,250 in January, 1903. (The October, 1901, payment by McPherson is apparently not included in the sums alleged to have been misappropriated.) At this time the Cannon stock was in New York City in the hands of Cannon for sale, subject to the direction of the secretary of the company. The first connection between Hocknell and this stock appears when he, on June 15, 1903, assumed to send two of the certificates therefor (1718 and 1719) from Ocean Park to Campbell on account of the sales of stock made to the latter about five or six months before. If Vickrey's fixing of dates is correct, the next is when he told Vickrey he had bought the Cannon stock, and the latter accepted him as the purchaser thereof, after his return from the east about July. The circumstances surrounding these transactions might justify a finding that the return mentioned was at least as early as June 15, 1903, thus accounting for the stock being in Hocknell's possession on that date after he had purchased it.

Giving the inconsistency between the assumption of ownership of the stock by Hocknell, June 15, 1903, and Vickrey's testimony that it was in July, all the consideration rationally possible, and it cannot be said that the trial court should have done more than to hold for the purpose of the nonsuit that Hocknell took control of the Cannon stock as early as June 15, 1903. We find, then, that he sold stock of the Hercules Oil Company at twenty cents in January, and that about five months thereafter he used the treasury stock of the corporation, for which he paid but two cents per share to the company, to make delivery on such sales. The date of the purchase from the secretary was either in June or July, and some uncertainty exists as to whether he made this purchase before or after he had used the stock for the purpose named. This stock was never registered in the name of Hocknell in the books of the company, but transferred to Hocknell's vendees upon cancellation of the Cannon certificates, and a record of the purchase of the stock in Cannon's name did not appear upon the books until August 31, 1903.

Conceding that the lack of certainty in the evidence as to the transactions from June to September was sufficient to arouse a suspicion or put the company upon inquiry as to these matters, there is no evidence to justify an inference that the money received in January belonged to the company. At that time the Cannon stock was in New York, Hocknell had no stock of the corporation to sell, and was not authorized to sell any on the company's account. There was no stock belonging to the company under his control that he could have fraudulently sold. The company could not have been compelled to deliver any stock to make good these sales. There is nothing in the evidence to show that the transactions were anything more than sales by Hocknell for future delivery made on his own individual account. A misrepresentation to his purchasers as to the stock he had or was authorized to sell would have been a fraud upon them and not upon the company, and the taking of funds so received would not have been a misappropriation of moneys of the corporation. There is not a scintilla of evidence from which the inference can be reasonably drawn that when the sales were made in January, Hocknell expected to acquire the Cannon stock to make delivery therefrom on these sales. If there were, the transaction would have been good as to the com-

pany if it be shown that Hocknell paid the full value of the stock at the time of purchase. The transactions as to the stock after Hocknell's return from the east appear from Mr. Vickrey's testimony to have been carried out in good faith and the company's interest properly looked after, and the full value of the stock at the time of sale obtained. Even the burden put upon accounting trustees was fairly met, and this all appears as part of plaintiff's case. Mr. Vickrey's testimony was uncontradicted and was entitled to, and no doubt did, receive full weight and credit from the trial court in granting the defendants' motion for a nonsuit.

A nonsuit may be granted by the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. (Code Civ. Proc., sec. 581, subd. 5.) The rules as to nonsuit are the same whether the trial is by the court or by a jury. (*Freese v. Hibernia Sav. etc. Soc.*, 139 Cal. 392, 394, [73 Pac. 172].) The motion admits the truth of all the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and the evidence should be interpreted most strongly against the defendant. (*Goldstone v. Merchants' etc. Co.*, 123 Cal. 625, [56 Pac. 776]; *Hanley v. California etc.*, 127 Cal. 232, [59 Pac. 577].) Whatever facts relevant to the issue the evidence tended to prove on plaintiff's behalf must be regarded as proved (*Ferris v. Baker*, 127 Cal. 520, [59 Pac. 937]), and the sufficiency or insufficiency of the evidence tending to sustain plaintiff's case cannot be considered. (*Zilmer v. Gerichten*, 111 Cal. 77, [43 Pac. 408].) All of these shadings of the rule, we think, mean simply that a nonsuit should be denied where the evidence, and the presumptions reasonably arising therefrom, are legally sufficient to prove the material allegations of the complaint, and that it should be granted where they are not. (*Goldstone v. Merchants' etc. Co.*, 123 Cal. 625, [56 Pac. 776].) To avoid a nonsuit, the evidence of the plaintiff must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. (*Janin v. London & S. F. Bank*, 92 Cal. 27, [27 Am. St. Rep. 82, 27 Pac. 1100].)

Measured by these rules, the evidence failed to show any misappropriation of moneys belonging to the plaintiff by Mr. Hocknell, and the nonsuit was properly granted.

Judgment affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 348. First Appellate District.—June 11, 1907.]

BAKER & HAMILTON, Appellant, v. G. W. LAMBERT,
Respondent.

GOODS SOLD AND DELIVERED—PLEADING—PARTNERSHIP LIABILITY—
WAIVER OF NONJOINDER.—A recovery may be had upon a partnership liability against one of the partners sued individually, where he fails to plead a nonjoinder of his copartner. Such failure operates as a waiver of objection.

ID.—EVIDENCE—SALE TO PARTNERSHIP.—In such case evidence is admissible for the plaintiff to show that a partnership existed between defendant and a third person, and that the goods sold and delivered were sold and delivered to such partnership; and it was error to refuse to admit such evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order refusing a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Page, McCutchen & Knight, for Appellant.

William H. Johnson, for Respondent.

COOPER, J.—This is an appeal from a judgment in favor of defendant, and from an order denying the plaintiff's motion for a new trial.

The complaint contains the common counts, alleging in various forms that the defendant is indebted to the plaintiff in the sum of \$575.28 for goods, wares and merchandise, sold and delivered by plaintiff to defendant at his special instance and request.

Upon the trial the evidence showed that a partnership had existed between the defendant and one Lipsett. Plaintiff then offered testimony tending to show a sale of the goods and merchandise to the partnership. The defendant objected to the offered testimony on the ground that under the pleadings the proof of a partnership indebtedness was inadmissible, and the court sustained the objection.

The question presented for decision is as to whether the allegations of the complaint as to an individual indebtedness can, in the absence of any plea of nonjoinder by defendant, be supported by evidence of a partnership indebtedness, the defendant being one of the partners. The precise question does not appear to have been decided in this state, and is an important one.

We are of opinion that the evidence was admissible. The indebtedness was the joint indebtedness of both the partners. The complaint, therefore, should have been against both, as they are united in interest (Code Civ. Proc., sec. 382). The code provides (Code Civ. Proc., sec. 430) that the defendant may demur to the complaint when it appears upon the face thereof that there is defect of parties defendant. It does not appear upon the face of the complaint that there is such defect, and hence the point could not have been raised by demurrer. It is further provided (section 433) that in such case the objection may be taken by answer; then follows section 434, which provides: "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same."

The defendant, knowing the fact that his partner was not joined, should have raised the question of such nonjoinder by his answer, if he desired to rely upon it. The provisions of the code in regard to the matter are simple, and easily followed. The object is to require the parties in good faith to state the matters and things relied upon so as to inform the adversary of the issues to be tried, with a view of disposing of cases upon their merits. It is with this object in view that courts must construe pleadings with reference to the code, so that neither party may gain an unfair advantage over his adversary. With the provisions of the code cited before his eyes, the defendant cannot be allowed to lull his adversary into repose, and, for the first time, raise the point which was at all times within his knowledge, but which he

waived by not alleging in his answer. Having remained silent when he should have informed the plaintiff, he will be precluded from speaking afterward. The rule was the same at common law.

In *Rice v. Shute*, 5 Burr. 2611, the judgment of the king's bench was given by Lord Mansfield. On the trial evidence was given that one Cole, who had not been made defendant, was a partner of Shute, and thereupon on motion of the defendant the lower court gave judgment of nonsuit against the plaintiff. The nonsuit was set aside and the court held that as the defendant had not pleaded the matter in abatement, he had waived it.

The above case was followed by Chief Justice Marshall in *Barry v. Foyles*, 1 Pet. 311, [7 L. ed. 157]. It was there said: "If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial. The course of decisions since the case of *Rice v. Shute* has been so uniform that the principle would have been considered as too well settled for controversy, had it not lately been questioned by a judge from whose opinions we ought not lightly to depart."

Rice v. Shute was again followed and approved by the supreme court of the United States in *Mason v. Eldred*, 6 Wall. 231, [18 L. ed. 783]. The opinion was by Judge Field, and it is there said: "It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the nonjoinder of his copartners, a recovery may be had against him for the whole amount due upon the contract."

In the Encyclopedia of Pleading and Practice, volume 15, page 98, the rule is stated as follows: "Where one partner is declared against, and nonjoinder is not pleaded in abatement, proof of a partnership contract is not a variance, as partnership obligations are to this extent regarded as joint and several." (See further, *Abbott v. Smith*, 2 W. Black. 925; *Woodworth v. Spofford*, 2 McLean, 168, [Fed. Cas. No. 18,020]; *Robertson v. Smith*, 18 Johns. 459, [9 Am. Dec. 227]; *Wilson v. McCormick*, 86 Va. 995, [11 S. E. 976]; *Smith v. Cooke*, 31 Md. 174, [100 Am. Dec. 58].)

In the case of *Williams v. Southern Pac. R. R. Co.*, 110 Cal. 457, [42 Pac. 974], it was held that in the absence of a plea of misjoinder one member of a copartnership may recover in his individual name the whole amount due the firm of which he was a member. That case was approved and followed as to the same point in *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, [45 Pac. 7]. It would seem upon principle that if, in the absence of a plea of misjoinder, in abatement, an individual as plaintiff can recover upon a liability due a partnership of which he is a member, a recovery could under like circumstances be had against him as defendant upon a partnership liability due from a partnership of which he is one of the partners.

A case very much like the case at bar is *Kerry v. Pacific Marine Co.*, 121 Cal. 564, [66 Am. St. Rep. 65, 54 Pac. 89]. The action was there brought against one of the part owners upon a contract relating to the ship, which should have been brought against all the owners jointly, and it was held that the action would lie in the absence of a plea by the defendant of the misjoinder of the other part owners.

It would require a great deal of imagination to give a reason why, if a part owner of a vessel cannot claim a misjoinder because he has not availed himself of it by proper plea in abatement, a member of a partnership can, under like circumstances, claim such misjoinder.

We have examined the cases cited by defendant; and while there are in many of them expressions which tend to support his position, we do not think any one of them is direct authority for the proposition contended for by defendant here. The one upon which most reliance is placed is *McCord v. Seale*, 56 Cal. 264. It was stated there in broad terms that the proof of a partnership contract would not sustain the allegation of the complaint as to an individual contract; but the report of the case shows that the answer contained, besides a general denial, "a separate defense of a partnership existing between the plaintiffs under the firm name of McCord and Malone at the time of the alleged transaction between them and the defendant."

The case is decided upon the theory that the point was properly raised in the answer. The question of waiver is not mentioned in the opinion.

It follows that the judgment and order should each be reversed, and it is so ordered.

Kerrigan, J., and Hall, J., concurred.

[Civ. No. 854. First Appellate District.—June 11, 1907.]

W. V. GAFFEY, Appellant, v. SAMUEL MANN, Respondent.

ACTION FOR SLANDER—DISMISSAL—ATTORNEY'S FEES—DECISION UPON FORMER APPEAL—PROPER JUDGMENT UPON REMITTITUR—NOTICE—

Where the plaintiff brought an action for slander, and caused the clerk to enter a dismissal thereof after defendant had incurred costs in taking steps to procure a dismissal thereof, and had included \$100 for counsel fees in his cost-bill, and upon a former appeal from an order striking out the counsel fees the order was reversed, leaving the cost-bill as to attorney's fees intact, upon going down of the *remittitur*, the court properly rendered judgment against plaintiff for \$100 counsel fees, without further notice and hearing, as an incident to the judgment, and for the further sum of \$32 costs upon appeal, to which no objection was taken.

ID.—CONSTITUTIONALITY OF COUNSEL FEES IN SLANDER CASES—LAW OF CASE.—No constitutional objection appears to the allowance of counsel fees to the prevailing party in an action for slander, under a law passed prior to the adoption of the present constitution; but without passing definitely upon that question, it is sufficient to say that the decision made upon the former appeal for the allowance of counsel fees to the respondent has become the law of the case, and this decision has become final.

APPEAL from a judgment of the Superior Court of Santa Cruz County, rendered after *remittitur* upon a former appeal. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court, and in the opinion rendered upon the former appeal, 3 Cal. App. 124, 84 Pac. 424.

Charles B. Younger, Jr., for Appellant.

H. C. Wyckoff, and J. E. Gardner, for Respondent.

HALL, J.—This is an appeal from a judgment entered against plaintiff upon the going down of the *remittitur* from this court, reversing in part an order of the superior court striking out all the items of a cost-bill filed by defendant after the dismissal of an action for slander. (*Gaffey v. Mann*, 3 Cal. App. 124, [84 Pac. 424].) In due time after the filing of the *remittitur* from this court in the lower court, the defendant filed his memorandum of costs on appeal, and thereafter, and after the expiration of the time for plaintiff to object or except thereto, and plaintiff having filed no objections thereto, the court, without notice to plaintiff and in his absence, entered judgment against plaintiff for the sum of \$100, as and for defendant's costs in said court, and the further sum of \$32, for his costs incurred on the former appeal.

Appellant now insists that this judgment must be reversed, for the reason that it was taken against him in his absence and without notice. But we do not think that this contention is sound.

Plaintiff brought the action for slander, and thereafter dismissed it, and caused the clerk to enter a dismissal thereof after defendant had incurred costs in taking steps to procure a dismissal thereof. (*Gaffey v. Mann*, 3 Cal. App. 124, [84 Pac. 424].) Thereupon defendant filed his cost-bill, containing two items, to wit, \$2 for clerk's fees for his appearance, and \$100 for counsel fees. Plaintiff thereupon moved to strike out each and every item thereof upon various grounds, in which were presented questions of fact as to the necessity for incurring such costs, and the validity thereof as matter of law. The court granted his motion, but upon the appeal to this court the order was reversed so far as it struck out the item in defendant's cost-bill of \$100 for counsel fees, upon the ground, as clearly appears from the opinion, that upon the facts and the law defendant was entitled to such costs. This left the cost-bill intact as originally filed, save as to the item of \$2 for clerk's fees, and there was nothing to do but enter judgment accordingly for the costs thus allowed. Costs are but an incident to the judgment. In this case judgment of dismissal had been entered, which carried with it a right to defendant to recover costs. He filed his cost-bill. Plaintiff filed his objections thereto, which having been passed upon by the trial court and this court, he

has had his day in court, and is not entitled to be further heard as to the amount or validity of the costs. The judgment of dismissal, to which the costs are but incidental, was entered at appellant's request.

Plaintiff further urged at the oral argument that the statute allowing attorneys' fees in slander and libel cases is unconstitutional, and that for that reason the judgment should be reversed, and cites *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, [88 Pac. 982], in which it was held that the mechanic's lien law, so far as it allowed attorneys' fees to a plaintiff, was void. But the libel and slander law differs in several respects from the lien law. The slander and libel law allows attorneys' fees to the prevailing party, whether he be plaintiff or defendant, while the lien law allows such costs only to the plaintiff. The lien law was passed after the adoption of the present constitution, while the slander and libel act was passed before the adoption of the present constitution. For these reasons the slander and libel act has been held constitutional in so far as it requires a plaintiff to give bond for costs. (*Smith v. McDermott*, 93 Cal. 421, [29 Pac. 34].) But without passing upon the constitutionality of the slander and libel act in allowing attorneys' fees to the prevailing party, it is sufficient to say that the order made upon the former appeal has become the law of the case. It was then determined that defendant was entitled to be allowed as a part of his costs \$100 for attorney fees, and this decision has become final. (*Heinlen v. Martin*, 59 Cal. 182; *Donner v. Palmer*, 51 Cal. 637; *Russell v. Harris*, 44 Cal. 489.)

Judgment is affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 8, 1907.

[Civ. No. 272. First Appellate District.—June 13, 1907.]

**HANNAH CAYFORD, Respondent, v. METROPOLITAN
LIFE INSURANCE COMPANY, Appellant.**

LIFE INSURANCE—UNPAID PREMIUM—FORFEITURE OF POLICY—LIMITATION OF AUTHORITY TO WAIVE—KNOWLEDGE OF ASSURED.—Where a policy of life insurance provided that the failure to pay any premium when due would render the policy void, and that none of its terms can be varied or modified, nor any forfeiture waived, or premiums in arrears received, except by agreement in writing, signed by either the president, vice-president, secretary, or actuary, whose authority for this purpose will not be delegated, and that no other person has or will be given such authority, such limitation of authority is valid, and the assured is chargeable with knowledge of its terms.

ID.—DELIVERY OF RECEIPT TO LOCAL SOLICITOR—UNAUTHORIZED EXTENSION OF TIME.—The delivery of a receipt to a local solicitor to collect the premium when due confers upon him no power to extend the time for payment of the premium when due, or to waive a forfeiture resulting from nonpayment thereof when due.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Page, McCutchen & Knight, for Appellant.

The assured is conclusively presumed to know the terms of his policy. (*Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 77, 58 Pac. 92, 61 Pac. 667; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Cleaver v. Traders' Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15, 19 Am. St. Rep. 118, 20 Pac. 1010; *Modern Woodmen v. Tevis*, 117 Fed. 369, 54 C. C. A. 293.) The limitation of power to waive forfeitures contained in the policy is valid. (*Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408; *Enos v. Sun Ins. Co.*, 67 Cal. 621, 8 Pac. 379; *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 77, 58 Pac. 92, 61 Pac. 667; *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 814,

24 Pac. 242; *Porter v. United States Life Ins. Co.*, 160 Mass. 183, 35 N. E. 678; *Carlson v. Metropolitan Life Ins. Co.*, 172 Mass. 142, 51 N. E. 525.) Authority merely to a local solicitor to collect premiums does not imply authority to extend time for payment of premiums, or to waive a forfeiture resulting from nonpayment. (*Byron v. National Life Ins. Assn.*, 21 R. I. 149, 42 Atl. 513; *Mutual Life Ins. Co. v. Abbey*, 76 Ark. 328, 88 S. W. 950; *Metropolitan Life Ins. Co. v. McGrath*, 58 N. J. L. 358, 19 Atl. 386; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. Rep. 126, 47 L. ed. 204; *Fidelity Mut. Life Assn. v. Bussell*, 75 Ark. 25, 86 S. W. 814, 816; *Nixon v. Travelers' Ins. Co.*, 25 Wash. 258, 65 Pac. 195, 196; *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092.)

L. A. Redman, for Respondent.

The general authority to the agent to collect the premiums to whom the receipt was committed for collection implied an authority to extend the time for payment, and to waive a forfeiture for failure to make prompt payment. (*Knarston v. Manhattan etc. Ins. Co.*, 124 Cal. 74, 56 Pac. 773; S. C., 140 Cal. 57, 73 Pac. 740; *Menk v. Home Ins. Co.*, 76 Cal. 50, 53, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; *Hanley v. Life Association*, 4 Mo. App. 253.)

KERRIGAN, J.—This is an action brought to recover upon a policy of life insurance. The jury returned a verdict for the plaintiff, upon which judgment was entered. The defendant's motion for a new trial was denied, and from the judgment and order denying its motion for a new trial the defendant prosecutes this appeal.

This case has once been before the supreme court upon an appeal taken from an order sustaining a demurrer. (*Cayford v. Metropolitan Life Ins. Co.*, 144 Cal. 763, [78 Pac. 258].)

The policy in question was issued on the life of Richard N. Cayford, plaintiff's husband, payable to plaintiff as beneficiary. It was issued March 20, 1902, and called for the payment of a semi-annual premium on the 20th of March and September in each year. The policy provided that the failure to pay any premium when due would render the policy void.

The second semi-annual premium fell due September 20, 1902, and was not paid. On October 5, 1902, the insured died. The testimony disclosed that J. N. Pittman had solicited the insurance, and had collected the first premium. On the 18th of September, two days before the second premium fell due, he called to collect this premium. Mrs. Cayford told him that they were not prepared to pay it. Pittman said that that would be all right; that he would call again on October 4th. On that day he accordingly called and saw Mrs. Cayford. She said she did not then have all the money, and asked him to call later in the afternoon, when she expected to have it, but he replied that he would call again on the 8th of the month. On the 5th of October the insured died. Pittman had with him on his visits of September 18th and October 4th the company's premium receipt for the second annual premium, executed as therein required by both the secretary of the company and its superintendent.

One of the provisions of the policy declares: "The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice-president, secretary or actuary, whose authority for this purpose will not be delegated; no other person has or will be given any authority."

Respondent claims that the events just narrated bring this case within the doctrine laid down in the case of *Knarston v. Manhattan Life Ins. Co.*, 124 Cal. 74, [56 Pac. 773]; 140 Cal. 57, [73 Pac. 740]. In that case a certain premium became due November 15, 1895. On that day and the next day the general manager of the company sent its collector to the insured to collect the premium. It was not paid. Through the efforts of one Gilmore, representing Knarston, the insured, two extensions of time within which to make payment were granted by the general manager. Within the extended time Knarston was killed in a railroad accident. The policy contained the usual forfeiture clause. The supreme court, in the two appeals in that case, held that an attempt by the company to collect a premium after default is a waiver of the forfeiture which might have otherwise been claimed; that where the insured died while the company was still trying

to collect the premium the policy would be treated as still in force. The decision turned expressly on the fact that the waiver was the act of a general agent of the insurance company, and that the insured had no notice of any limitation on his authority.

There is no doubt that this case, as claimed by the respondent, would be within the doctrine of the Knarston case if the acts of Pittman were the acts of the company. Counsel for the respondent argues that the possession of the receipt after its due date by Pittman, the collector of the company, implied the power to deliver it after that date; that there appeared on the face of the receipt no limitation of its validity if delivered after the due date of the premium; that accordingly, if it had been in fact delivered by Pittman, though after the due date, his act would have been the act of the company, and the forfeiture would have been waived. We cannot agree with this view. Mrs. Cayford did not know that Pittman had the premium receipt, and she knew nothing of its contents. No knowledge of the extensions of time to pay the premium, granted by Pittman to the insured, was brought home to the company. The limitation, in the conditions of the policy, on the authority of subordinate agents to waive forfeitures or collect overdue premiums is valid. (*Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408; *Enos v. Sun Ins. Co.*, 67 Cal. 621, [8 Pac. 379]; *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 77, [58 Pac. 92, 61 Pac. 667].) The assured knew of this provision, or, what is the same thing, is charged with knowledge of it. (*Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 77, [58 Pac. 92, 61 Pac. 667].) Under the circumstances of this case it cannot be held that the company waived the forfeiture caused by the failure to pay the premium when due. Authority to collect premiums does not imply authority to extend the time for the payment of such premiums, or to waive a forfeiture resulting from nonpayment. (*Byron v. National Life Ins. Assn.*, 21 R. I. 149, [42 Atl. 513]; *Mutual Life Ins. Co. v. Abbey*, 76 Ark. 328, [88 S. W. 950]; *Metropolitan Life Ins. Co. v. McGrath*, 58 N. J. L. 358, [19 Atl. 386].)

In the case of *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, [23 Sup. Ct. Rep. 126], the policy contained a clause similar to the one referred to in the policy in this case, restricting the power of the agents of the company in the matter of

waiving forfeitures. In that case it was claimed that, conceding the validity of such a clause, the clause itself had nevertheless been waived by the company. A premium note had been placed in the hands of an agent for collection. He had extended the time for its payment, and it was allowed to remain in his hands after maturity. It was held, nevertheless, that his act was unauthorized, and that the company was not estopped from relying on the forfeiture.

In the case of *Bank of Commerce v. New York Life Ins. Co.*, 125 Ga. 552, [54 S. E. 643], it was held that the acceptance of money by a collecting agent upon an overdue premium note did not bind the company as a waiver of the forfeiture resulting from nonpayment of the note at maturity.

The following cases tend more or less to support the conclusion we have reached in this case: *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, [108 Am. St. Rep. 578, 80 Pac. 609, 1092]; *Fidelity Mut. Life Assn. v. Bussell*, 75 Ark. 25, [86 S. W. 814].

The judgment and order are reversed.

Hall, J., and Cooper, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 13, 1907.

[Civ. No. 347. First Appellate District.—June 13, 1907.]

ROSS H. VAN HORN, Respondent, v. MARION V. VAN HORN, Appellant.

DIVORCE—ADULTERY—EVIDENCE—GOOD CHARACTER OF DEFENDANT.—In action for divorce on the ground of adultery of the defendant, the character of the defendant is not in issue, and the court properly refused to admit evidence of her good character, where her good character as a witness had not been impeached.

ID.—GOOD CHARACTER OF CORRESPONDENT.—The correspondent named with whom the adultery was charged is not a party to the action, and where he had not been impeached as a witness, evidence of the excellence of his character was properly rejected.

ID.—CUSTODY OF MINORS—DISCRETION.—Where the only minor was a boy fifteen years of age, and the defendant was adjudged guilty of adultery, the court had discretion to award the custody of the boy to his father. Such custody is always a matter within the discretion of the trial court; the contention that the excluded evidence of good character should have been received on that question has but little merit.

ID.—RULING OF TRIAL COURT REJECTING EVIDENCE—OBJECTION IMMATERIAL.—The ruling of the trial court in rejecting evidence will be upheld on appeal, if correct, whether the ground on which it was based was stated in the objection as to the evidence or not.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial, F. B. Ogden, Judge.

The facts are stated in the opinion of the court,

Alfred B. Weiler, for Appellant.

Johnson & Shaw, for Respondent.

KERRIGAN, J.—Appeal by defendant from a judgment, awarding plaintiff an interlocutory decree of divorce, and from an order denying defendant's motion for a new trial.

The complaint alleges that the appellant committed adultery with one Adolph Knopf, and prays for a judgment of divorce, and that the whole of the community property and the custody of the two minor children be awarded to the respondent. During the pendency of the action one of the children reached majority. The action was tried, and an interlocutory decree was entered awarding respondent a divorce and the custody of the remaining minor child. The question of the property rights was reserved.

Among the assigned errors was the action of the trial court in refusing to permit appellant to introduce evidence of the good character of herself and the corespondent. The general rule is that in civil actions, evidence of character of neither party thereto is admissible. (5 Am. & Eng. Ency. of Law, pp. 861, 862; 1 Wigmore on Evidence, sec. 64.) There are exceptions to this rule. In actions for slander and libel, character is necessarily put in issue, as injury to character is the gist of such actions. (5 Am. & Eng. Ency. of

Law, p. 865.) There are a few other exceptions, and by some authorities different conclusions are reached as to whether the charge of adultery in an action for divorce is one of the exceptions. In this state, however, the question is controlled by section 2053, Code of Civil Procedure, which reads: "Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character." By the allegation of adultery appellant's character was not put in issue, and evidence concerning it, under this section, was properly excluded. The correspondent was not a party to the action, nor had he, as a witness, been impeached (Code Civ. Proc., sec. 2051), so evidence of the excellence of his character was properly rejected. (Code Civ. Proc., sec. 2053; *People v. Bush*, 65 Cal. 134, [3 Pac. 590], concurring opinion.)

In this connection it is further contended by appellant that the custody of the minor children was involved, and for this reason testimony of the character of the appellant was admissible. The disposition of minors, in a proceeding of this kind, is always one within the control, and subject to the sound legal discretion, of the trial court. The court may modify its decree as to their custody at any time. (Civ. Code, sec. 138; *Crater v. Crater*, 135 Cal. 635, [67 Pac. 1049].) "Its jurisdiction does not depend upon specific allegations as to the fitness of the respective parties, or their ability or willingness to care for their offspring, nor upon a specific prayer for the custody." (*Ex parte Gordon*, 95 Cal. 377, [30 Pac. 561].) In matters of this kind much must be left to the sound discretion of the court in accepting or rejecting evidence. We can readily conceive of instances in which the excluded evidence might very properly be admitted. In this case, however, the minor being a boy now about fifteen years of age, and the appellant having been adjudged guilty of adultery, we think the contention has but little merit.

Appellant complains that the objections to the excluded evidence just considered, and to at least one other question, were too general, and not directed to defects now urged. The ruling of the trial court in rejecting evidence will be upheld on appeal, if correct, whether the ground upon which it is

based was stated in the objection or not. (*Davey v. Southern Pac. Co.*, 116 Cal. 325, [48 Pac. 117].)

This disposes of all the grounds urged for reversal which merit consideration. No error appearing in the record, the judgment and order are affirmed.

Hall, J., and Cooper, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 11, 1907, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 13, 1907.

[Civ. No. 847. Second Appellate District.—June 14, 1907.]

J. CATHER NEWSOM, Respondent, v. H. J. WOOLLACOTT, Appellant.

ACTION FOR SERVICES OF ARCHITECT—PLEA OF ACCORD AND SATISFACTION—CHECK IN SATISFACTION—EXECUTION NOT DENIED—JUDGMENT ON PLEADINGS.—In an action to recover for the services of an architect, on a specified contract, where the answer sets up a different contract, and sets up a check paid in full of all demands by way of accord and satisfaction, the execution of which check was not denied, the court did not err in denying the defendant's motion for judgment on the pleadings. The admission of the execution and genuineness of the check did not admit the plea of accord and satisfaction set forth in the answer.

ID.—MEMORANDUM ON CHECK—IN FULL FOR FEES—PAROL EVIDENCE—EFFECT OF TERMS.—Where the check set forth in the answer, the execution of which was not denied, contained the written memorandum, "In full for 9th and Grand Ave. fees," and it appears that the services sued for were for the erection of a hotel on 9th street and Grand avenue in Los Angeles, the plaintiff might, notwithstanding the failure to deny its execution, introduce parol evidence to controvert it by showing mistake, fraud or like defense, or that it had no connection with the contract sued on; but, in the absence of such evidence, the instrument stands as an exponent of the facts therein set out, and must be taken for what it purports on its face to mean.

ID.—PRESUMPTIVE KNOWLEDGE—IMPROPER INSTRUCTION.—The plaintiff, having failed to controvert or explain the check by parol testi-

mony, must be presumed to have had full knowledge of the existence and terms of the memorandum on the check, when delivered to him, and before it passed out of his possession; and it was error to instruct the jury in effect that, notwithstanding they found the check was intended to apply to the demand sued on, they must, nevertheless, in order to render a verdict for the defendant, find the further fact that plaintiff was aware of the memorandum written thereon, when delivered, or that he knew of the writing upon the check before it passed out of his possession.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. W. P. James, Judge.

The facts are stated in the opinion of the court.

Tom C. Thornton, for Appellant.

Drew Pruitt, and Morton, Houser & Jones, for Respondent.

SHAW, J.—The respondent, who is an architect, alleges that he was employed by appellant to prepare certain plans and specifications and receive estimates for, and superintend the erection of, a three-story hotel on the southwest corner of 9th street and Grand avenue, in the city of Los Angeles, of the estimated cost of \$64,000; that the reasonable value of the services agreed to be performed by respondent for appellant was the sum of \$2,560; that respondent entered upon said employment, prepared the necessary plans and specifications for said building, and received estimates for the erection thereof; that notwithstanding the fact that respondent at all times was ready and willing to perform his part of said agreement, he was, about June, 1904, wrongfully discharged by appellant.

In his answer appellant denies all of said allegations and sets up another agreement, under which respondent was to submit plans for a building which should not involve an expenditure to exceed \$25,000; that the plans submitted called for the expenditure of an amount largely in excess of said sum; that respondent admitted that such plans were not in conformity with their agreement; that thereupon plaintiff and defendant, after a full discussion of plaintiff's claim for compensation, had a full accounting, and accord and satis-

faction, wherein it was agreed that defendant should pay plaintiff the sum of \$150 in full of all demands which plaintiff might have or claim against defendant by reason of his negotiations, labors, or otherwise, in connection with the proposed building on 9th street and Grand avenue, which sum appellant paid to respondent in full satisfaction of all his demands in the premises; that said payment was made by a check, payable to the order of plaintiff, in the lower left-hand corner of which was a memorandum in the words and figures following: "In full for 9th and Grand ave. fees"; which check was duly indorsed and cashed by plaintiff. A copy of this check, with the indorsement thereon, is made a part of defendant's answer. No affidavit denying the check was served or filed by plaintiff, as provided in section 448, Code of Civil Procedure.

Defendant's motion for judgment on the pleadings was denied. The case was tried before a jury, which gave a verdict for plaintiff and judgment was entered accordingly. The appeal is from the judgment and an order denying defendant's motion for a new trial.

There was no error in the denial of appellant's motion for judgment on the pleadings. Admitting the execution and genuineness of the check was not an admission of the new matter set up in the answer by way of accord and satisfaction, or that the check related in any way to the transaction set forth in the complaint; all of which, under section 462, Code of Civil Procedure, must be deemed to be controverted. It, therefore, devolved upon defendant to connect this check with the transaction upon which plaintiff based his action and prove that it was given and received as alleged in the answer. In the absence of evidence establishing such facts, it did not in itself constitute sufficient evidence in support of the new matter alleged in the answer. While plaintiff admitted receiving the check, and that it was genuine and duly executed, he did not admit that it was received as set forth in the answer. "The effect of an admission of the genuineness and due execution of an instrument pleaded by a defendant, and not denied, as provided by section 448 of the Code of Civil Procedure, is to avoid the necessity of proof of its genuineness and due execution, and nothing more; and whether it is proven or its execution is admitted its terms and legal

effect are to be determined by an inspection of the instrument." (*Carpenter v. Shinnors*, 108 Cal. 362, [41 Pac. 473].)

At the trial the appellant offered no evidence whatever. He now contends that the evidence was insufficient to justify the verdict, and that the court erred in its charges to the jury. The court instructed the jury as follows: "If you find that the check was intended to apply to the demand here sued upon, and that plaintiff accepted the check with words written thereon indicating that it was to be in full payment of all of such demands, and *that he was aware of the presence of such words*, then the check should be received by you as evidence of a complete settlement of such demand." In another part of the charge the jury were instructed upon the theory that it was for them to find from the evidence whether or not plaintiff had *knowledge of the presence of the memorandum at the time of the delivery of the check to him, or knew of the writing upon such check, before it passed out of his possession.*

Having failed to file the affidavit of denial required by section 448 of the Code of Civil Procedure, respondent is deemed to have admitted the execution and genuineness of the instrument. Notwithstanding this admission he may controvert the instrument by evidence of mistake, fraud and like defenses, or show that it had no connection with the demand sued upon. (*Moore v. Copp*, 119 Cal. 429, [51 Pac. 630].) He offered no evidence touching the question, and in the absence of any testimony, the instrument stands as an exponent of the facts therein set out, and its terms and legal effect are to be determined by an inspection of the instrument. (*Carpenter v. Shinnors*, 108 Cal. 362, [41 Pac. 473].) In the absence of any evidence to the contrary, respondent is chargeable with what the instrument purports on its face to be, and it must be taken for just what it appears to mean. (*Petersen v. Taylor*, 34 Pac. 724; *Brooks v. Johnson*, 122 Cal. 569, [55 Pac. 423].) Having failed to controvert it, respondent must be presumed to have had knowledge of the existence of the memorandum on the check at the time of the delivery thereof to him and to have known of the writing thereon before it passed out of his possession. No proof of this fact was necessary. It was, therefore, error to instruct the jury, in effect, that notwithstanding they found

the check was intended to apply to the demand sued upon, they must, nevertheless, in order to render a verdict for defendant, find the further fact that respondent was aware of the presence thereon of the words, "In full for 9th and Grand avenue fees," and that respondent "had knowledge of the presence of the memorandum written on the check at the time of its delivery to him," or that "he knew of the writing upon such check before it passed out of his possession." All that can be claimed for this check is that it constituted a receipt for money paid to respondent pursuant to the alleged settlement. As such, it is open to contradiction or explanation by parol testimony. In the absence of such contradiction or explanation, respondent is bound by what it purports on its face to mean. (*Simmons v. Oullahan*, 75 Cal. 508, [17 Pac. 543]; *Snodgrass v. Parks*, 79 Cal. 55, [21 Pac. 429].) There is nothing in *Greer v. Laws*, 56 Ark. 37, [18 S. W. 1038], or in *Rapp v. Giddings*, 4 S. Dak. 492, [57 N. W. 237], cited by respondent, inconsistent with the general rule.

The judgment and order are reversed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 116. Third Appellate District.—June 17, 1907.]

HERCULES WATER COMPANY, Respondent, v. B. FERNANDEZ, Appellant.

EMINENT DOMAIN—CONDEMNATION OF WATER RIGHTS—INSUFFICIENT COMPLAINT—SPECIFIED TOWNS AND "OTHER PLACES" IN COUNTY.
A complaint by a water company in an action of eminent domain, against the owners of riparian rights to condemn the same to public use for the purpose of supplying two specified towns "and of other places in said county" with water, the term "other places" is too indefinite to embrace either the whole county, or any particular body of inhabitants thereof, nor can those words be regarded as surplusage; but the complaint must be held insufficient as seeking the aid of the statute for an unauthorized purpose, and as being indefinite and uncertain as to the uses for which the condemnation was sought.

ID.—BLENDING OF LAWFUL AND UNLAWFUL PURPOSES.—Where the proceeding shows upon its face two distinct uses or purposes, one lawful and the other not, which are so inseparably blended in the petition and orders as not to be severable, it cannot be sustained; and an application to condemn property for purposes, part of which are within and part not within the act, will be bad *in toto*.

ID.—TERMS OF STATUTE—EXTENT OF USE.—The statute, besides allowing water to be condemned for public use in towns, villages, and incorporated cities, allows it to be condemned in behalf of canals, ditches, etc., for "conducting or storing water for the use of the inhabitants of any county," not for the inhabitants of places in any county indefinitely described, or for the inhabitants of less than those of the entire county. All may not enjoy the use, but the use must be capable of enjoyment by all.

ID.—COMPLAINT—PUBLIC USE—FINDING.—A complaint seeking to condemn water rights for public use must state facts showing that the use is one of those enumerated in the statute. A mere general averment that the use for which the property is sought to be taken is a public use is insufficient; and the trial court cannot obviate the requirement of pleading by a finding that the use is a public use.

ID.—MEASURE OF DAMAGES—DEPRECIATION IN VALUE OF PROPERTY.—The measure of damages for the taking of the rights of a riparian owner for a public use is the difference in what the property was worth immediately before the appropriation, and what it was worth affected by the appropriation. The single fact to be determined is the depreciation in the value of the property affected by the taking away from it the water sought to be condemned, to be ascertained by competent and proper evidence.

APPEAL from a judgment of the Superior Court of Contra Costa County. Wm. S. Wells, Judge.

The facts are stated in the opinion of the court.

Morrison & Cope, and Morrison, Cope & Brobeck, for Appellant.

Pillsbury, Madison & Sutro, for Respondent.

CHIPMAN, P. J.—Eminent domain. The complaint alleges corporate organization of plaintiff under the laws of this state, for the purposes, among others, of acquiring water rights, "on one or more rivers, creeks or streams within the state of California; of acquiring, purchasing, erecting, constructing, holding, owning, improving and leasing dams, reser-

voirs, tanks, canals, flumes, aqueducts, ditches, pipe-lines and other water-ways or conduits and securing and impounding springs, streams and all other water-ways; of buying, selling, owning, or otherwise dealing in, water for domestic, irrigation, manufacturing and all other purposes; of furnishing, supplying and selling the same to any county, city and county, city, town, and the inhabitants thereof; of acquiring, constructing and maintaining reservoirs, tanks, canals, pipe-lines"; avers the ownership of water rights in the waters of Pinole creek, Contra Costa county, "being the right to divert and use the waters of said creek and to store the same for the purpose of supplying the inhabitants of the town of Pinole and of the town of Hercules and of other places in the said County of Contra Costa, with water for domestic and other necessary and useful purposes"; avers the ownership of a reservoir and pumping plant and pipe-line whereby said water is diverted from said creek and pumped into said reservoir; that it owns pipe-lines leading from said reservoir to various places in the towns named, "and elsewhere in said County" by means of which "it now supplies water for said purposes to the inhabitants of said town of Hercules and to the inhabitants of said town of Pinole, and by means of which it expects and intends to supply water for like purposes to the inhabitants of other places in said County"; that the uses and purposes for which the property, rights and easements already acquired have been and are being appropriated are public uses within the meaning of the law of this state; that it is necessary, in order to make effective use of the waters of said creek as aforesaid by means of dams erected across said creek at various places thereon above the lands of defendant, to impound all the waters of said creek in order to facilitate the taking all of the water of said creek at a point or points above the land of defendant, to wit: at the said pumping station and at other points on said creek, and to store the same in said reservoir of plaintiff; that plaintiff is the owner of all the riparian lands and rights upon said creek which are affected by the diverting of said water, as aforesaid, except the premises hereinafter described. The complaint then describes the lands of defendant Fernandez and other defendants alleged to be affected by the condemnation sought, and alleges that

said creek flows through each parcel of land thus described, to the waters of which defendants are the owners of riparian rights; "that for the purpose of supplying the inhabitants of the town of Hercules and of the town of Pinole and of other places in said County of Contra Costa with water as aforesaid, it is necessary that the plaintiff should acquire, have and hold an easement in and to all the waters of said Pinole Creek . . . for the aforesaid use and purpose of supplying the inhabitants of the said towns named, and of other places in said county of Contra Costa with water."

The defendants other than defendant Fernandez made default, which was duly entered. Defendant Fernandez demurred to the complaint generally for insufficiency of facts, and specially on the grounds of uncertainty, ambiguity and unintelligibility.

The demurrer was overruled and defendant Fernandez answered, denying specifically the material allegations of the complaint.

The findings follow closely the allegations of the complaint, the court finding, among other facts, that plaintiff, at the commencement of the action, was supplying water and since has been supplying water as alleged to the two towns named and "expects and intends to supply water for like purposes to the inhabitants of said towns and of other places in said County"; the court also finds that, in order to make effective use of said water sufficient to supply the inhabitants of said two towns "and of other places in said County with water," it is necessary to impound the waters of said creek as alleged in the complaint; that for the purpose of supplying the inhabitants of said towns "and other places in said County of Contra Costa with water it is necessary that plaintiff acquire . . . an easement to all the waters of said Pinole Creek, to wit": the right by means of dams at various places above defendant's lands and store the same, "for the aforesaid use and purpose of supplying the inhabitants of the town of Hercules and of the town of Pinole and of other places in said County of Contra Costa with water."

In assessing the damages the court found the total damages to be \$2,675.00, as follows: 1. That the rights and easements belonging to the defendant Fernandez are fixed at \$1,000; 2. The damage to accrue to the first, second and third parcels

of his land, as described in the complaint, is fixed at \$25 each, and to the fourth parcel it is fixed at \$1,600, the last three items of damage by reason of the severance of his said riparian rights from said parcels of land. The findings generally follow the allegations of the complaint and the judgment follows the findings.

Defendant Fernandez appeals from the judgment on bill of exceptions.

It is urged by appellant that the general demurrer should have been sustained, for that it is sought by the proceedings to condemn water for the use of places in the county which are not described as cities, towns or villages or otherwise as required by statute law. The special demurrer also points out that the complaint is ambiguous, uncertain and unintelligible, among other grounds, because it cannot be ascertained therefrom whether it is necessary to condemn the said water rights for the purpose of supplying the inhabitants of the towns named, or for the purpose of supplying the inhabitants of "other places" in said county.

Section 1238 of the Code of Civil Procedure provides as follows: "Subject to the provisions of this title, the right of Eminent Domain may be exercised in behalf of the following uses: 3. . . . canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town. . . ." Section 14, article I of the constitution prohibits the taking or damaging of private property for public use without just compensation having first been made. We are, however, to look to the legislature to ascertain what constitutes a public use and for the authority to exercise the right of taking or damaging private property for a public use. The only limitation upon this power is contained in the constitution. (*Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, [32 Pac. 802].) Section 1241 of the Code of Civil Procedure provides that before private property can be taken it must appear "that the use to which it is to be applied is a use authorized by law," and the uses so authorized are those specified in the statute (Code Civ. Proc., sec. 1238), and none others.

The words "the inhabitants of," as used in the complaint, we think should be read in connection with the words "other

places in the County of Contra Costa," and it was not necessary to repeat them before the latter words. But these latter words, as used in the complaint, are clearly in addition to, and were intended to embrace, territory different from that of a town, village, city or incorporated city and county. Unless, therefore, a construction can be given to these words which would make them equivalent to an averment that the purpose was to supply with water the inhabitants of the county of Contra Costa, we do not see how the complaint can be upheld as seeking to condemn for a public use. Such construction, however, we think unwarranted. "Other places" cannot mean all places in the county other than the towns of Hercules and Pinole, nor can the complaint be held to mean all the inhabitants of the county other than said towns. The terms are too indefinite to embrace either the whole county or any particular body of the inhabitants who are to be supplied with water. Apparently the plaintiff is to be the exclusive judge of whom and what places it will supply with water, and no reciprocal right attaches to any particular group of the inhabitants of such places to demand service of plaintiff. "The other places might be," as suggested by appellant, "factories, such as that of the California Powder Works, or they might be farms belonging to one individual, or hotels, stores, shops, residences, or innumerable other private places and establishments." Nor do we think by this illustration "that counsel are sticking in the bark," as replied by respondent. It is true that in supplying these places plaintiff would be engaged in supplying water to some of the inhabitants of the county of Contra Costa, but would plaintiff be under obligation to supply the inhabitants of the whole or any definite part of the county? It was said in *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, [32 Pac. 802], at page 681: "It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use."

The statute authorizes the exercise of the right of eminent domain (except as to towns, villages and incorporated cities), in behalf of canals, ditches, etc., for "conducting or storing

water for the use of the inhabitants of any county," not for the inhabitants of places in any county, indefinitely described, or for the inhabitants less than those of the entire county. All may not enjoy the use, but the use must be capable of enjoyment by all. In the Lindsay case, *supra*, the court said: "Whether the particular region is a farming neighborhood, and whether the supplying of water to that neighborhood constitutes a public use, are questions of fact, which must be determined by the court before whom the proceeding is had, and its decision thereon must be held conclusive upon this court to the same extent as in other cases where it is called upon to determine matters of fact." It is hence urged by respondent that as there is a finding to the effect, as is claimed, that the supplying of water to the inhabitants of the town of Hercules and of the town of Pinole *and other places in said county of Contra Costa*, constitutes a public use, is conclusive upon this court. The finding of the court was not that to supply water to "other places in said county" was a public use, but that "the rights and easements already acquired and owned have been, and at the time of the commencement of this action were and now are being, appropriated, are public uses." But had the findings gone to the extent claimed, we do not think it would have been conclusive upon this court. The statute under examination in the case just cited made the supplying of farming neighborhoods with water a public use. The question involved was as to the sufficiency of the evidence to sustain the judgment that the particular land constituted a farming neighborhood. The court did not mean that the trial court could conclusively determine what the legislature alone can determine. It is not sufficient for the pleader to allege that the use for which property is to be taken is a public use. The complaint must show that the use is one of those enumerated in the statute, and the trial court cannot obviate this requirement by finding the use to be a public use. It was said in the case last cited: "Whoever, under the claim of agency of the state, would deprive the owner of any of his property by virtue of the exercise of eminent domain must show not only that the use for which he seeks to appropriate it is a public use, but also that the legislature has authorized the taking of property for that particular use, and in the mode in which

he is seeking to appropriate it. The legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public and will be recognized by the courts; but whether, in any individual case, the use is a public use must be determined by the judiciary from the facts and circumstances of the case." As we understand the decision: If, for example, a question of fact had arisen as to whether or not Hercules is a town or village, it would be for the court to determine that fact and its finding upon conflicting testimony would be conclusive. But if the legislature had not provided for the condemnation of riparian rights for the benefit of towns or villages, no right of condemnation could rest upon such finding by the trial court, even with the added finding that the supplying of water to such towns was a public use. A corporation can no more condemn property for purposes not declared to be public uses than for purposes without the power conferred by the corporation charter; and that this latter cannot be done was held in *Chicago & N. W. Ry. Co. v. Galt*, 133 Ill. 657, [23 N. E. 425, 24 N. E. 674], conceded by respondent to be good law.

Mr. Lewis says: "The petition should show the use or purpose for which the property is desired, and that it is within the statutory powers conferred. It should show a clear right to condemn the property described." (2 Lewis on Eminent Domain, sec. 353. See, also, 7 Encyclopedia of Pleading and Practice, p. 526.) "Where the proceeding shows upon its face two distinct uses or purposes, one lawful and the other not, which are so inseparably blended in the petition *and orders* as not to be severable, it cannot be sustained." (7 Encyclopedia of Pleading and Practice, p. 527.) Here, both by averments of the complaint and by the findings and judgment of the court, a necessity is alleged and found for the condemnation to supply not only the inhabitants of the towns named but also of other places in the county of Contra Costa.

Nor can the terms "other places" be disregarded as surplusage or stricken out by amendment of the judgment. The court found that the water was necessary not only for the inhabitants of the towns named, but that in order to make effective use of said waters sufficient to supply the inhabitants

of said two towns *and other places in said county*, it is necessary that plaintiff acquire an easement to *all the waters of said creek*. We cannot say that the trial court would have found it necessary to condemn all the waters of the creek if plaintiff had not expressed an intention in its complaint to use the waters of the creek elsewhere than in said towns and had asked for a decree to that effect.

Mr. Lewis cites cases holding that where an act combined a private use with a public use in a way that the two cannot be separated, the whole act is void. He adds: "So an application under an act to condemn property for purposes, part of which are within and part not within the act, will be bad *in toto*." (1 Lewis on Eminent Domain, sec. 206.)

If plaintiff had no right to condemn the riparian rights of defendant Fernandez to supply water to the inhabitants of other places than the towns named, the complaint was indefinite and uncertain in the particular claimed as well as seeking the aid of the statute for an unauthorized purpose.

A private corporation formed for private gain, under guise of serving the public, should not be permitted to take private property through the extraordinary remedy of eminent domain, and under an assumed agency of the state, upon any strained or doubtful construction of the statute declaring what are public uses.

Error is claimed arising out of the method adopted by the trial court in assessing the damages. As the cause must be remanded for a new trial, we deem it best to notice this point.

Over defendant's objection the court allowed the witness McMahon to testify that the value of water rights all along the banks of Pinole creek was about \$2 per running foot, apparently without regard to the extent of the land at different places lying back of the creek. There were several tracts of land of appellant, marked on the map used at the trial, of various acreage—in all about one hundred and eighty-two acres through which the creek flowed for a distance of about eleven hundred and ninety feet. The damage awarded was \$2,675, made up as shown above. Whether appellant was injured by this particular testimony is not clear, for the court seems to have assessed the damage to all the land by reason of the severance of the riparian rights, and in addition allowed a separate sum for the rights and easements belonging

to appellant. In the present case the riparian rights alone were sought to be condemned and the water was to be taken at a point above appellant's land. No part of his land was sought to be taken.

It seems to us that the true rule is stated by respondent—that the measure of damage to a riparian owner by the appropriation or diversion of the waters is the depreciation in the value of the property affected by the taking. The question was thus disposed of in *Lee v. Springfield Water Co.*, 176 Pa. St. 223, [35 Atl. 184], where the court said: "The defendant had seized a part of the waters of Crum Creek for the supply of its water works. The plaintiffs are mill owners on the same stream, and below the point at which the water is taken. The object of this action is to ascertain the damages sustained by the plaintiffs by reason of the appropriation of a portion of the water of the stream that had previously flowed through their property, and been used by them to aid in propelling their machinery. The true measure of damages to be applied in all cases of a taking by virtue of eminent domain is involved in no doubt. It is easy of application. It is the depreciation in value of the property affected by the taking. Where land is taken this has been said so frequently that it would be a work of supererogation to cite the cases in which the doctrine has been stated and applied. It was applied in *Miller v. Windsor Water Co.*, 148 Pa. St. 429, [23 Atl. 1132], where, as in this case, a water company had appropriated water, and a lower riparian owner complained that he was injured by the appropriation. It is the proper measure of the plaintiff's damage in this case. The jury should inquire what the property affected was fairly worth immediately before the water was appropriated, and what it was worth affected by the appropriation. The difference, if any, is the loss actually sustained, and therefore the measure of the plaintiff's right to recover damages."

It was also so held in *City of Syracuse v. Stacey*, 169 N. Y. 231, [62 N. E. 354].

Appellant claims that the extent of the riparian right is to be measured by the area of land adjacent to the stream and within the watershed; citing *Alta Land etc. v. Hancock*, 85 Cal. 219, 229, 230, [20 Am. St. Rep. 217, 24 Pac. 645]; *Wiggins v. Muscupiabe L. & W. Co.*, 113 Cal. 182, 195, [54 Am.

St. Rep. 337, 45 Pac. 160]. There seems to be but little, if any, disagreement between counsel upon the rule. The point made by appellant is that the measurement of damages by the running foot was, in view of the facts of the case, an improper method of ascertaining the compensation, and upon the point we agree with appellant. Such method wholly disregards the extent of the land adjacent to the stream and within its watershed and owned by the defendant. The riparian right to a narrow strip of land a hundred feet wide would thus have the same value as it would have if the body of land had a width of a thousand feet. Then again, the water frontage in question embraced land lying along a creek of fresh flowing water and land also whose frontage was on tide water unfit for domestic use. It is not probable that the riparian right was of equal value foot by foot of all this frontage.

The single fact to be determined was the depreciation in the value of the property affected by the taking away from it the water sought to be condemned, to be ascertained, of course, by competent and proper evidence.

The judgment is reversed, with directions to sustain the demurrer, plaintiff to have leave to amend its complaint if so minded.

Hart, J., and Burnett, J., concurred.

[Civ. No. 359. Second Appellate District.—June 18, 1907.]

MANUEL MONTIJO et al., Appellants, v. ROBERT SHERER & CO., Copartners, et al., Defendants; MARK RYAN, Respondent.

JUDGMENT BY DEFAULT—VACATION—NOTICE AND AFFIDAVITS—CONJUNCTIVE FORM OF GROUNDS—CONSTRUCTION—SUFFICIENCY.—The affidavits used on a motion to vacate a judgment by default are not to be construed with the strictness applied to a pleading in matters of form; and the fact that the grounds of the motion are stated conjunctively in the notice and affidavits filed, that "said defendant failed to answer in time through inadvertence, mistake, and ex-

cusable neglect," is not material. It is sufficient if the facts proved justify the action of the court in relieving the applicant on the ground of inadvertence, mistake, or excusable neglect.

ID.—SUFFICIENCY OF SHOWING—ACTION FOR FORCIBLE ENTRY—EMPLOYMENT FOR ANSWERING DEFENDANT—RELIANCE UPON SUPPOSED OWNERSHIP—DISCRETION.—Where the moving party was in the employ of a codefendant who answered the complaint, and who informed him that an interurban railway company was the owner of the premises and would take care of the suit, and that he need not bother about it, and that relying thereupon he failed to answer, under the circumstances he had the right to rely upon the statement that the corporation whom he believed was the real party in interest would protect him, and the fact that his employer had answered was a circumstance to be considered by the court, and the court properly exercised its discretion in favor of a trial of the case on its merits.

ID.—AFFIDAVIT OF MERITS—VERIFIED ANSWER.—Although no sufficient separate affidavit of merits was embodied in the affidavits, yet where the verified answer to the complaint was filed with the affidavits, and a copy thereof was served with the notice and affidavits, such verified answer is of itself a sufficient affidavit of merits.

APPEAL from an order of the Superior Court of Los Angeles County, setting aside a judgment by default and granting leave to answer. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

Hugh J. Crawford, and William Crawford, for Appellants.

Bicknell, Gibson, Trask, Dunn & Crutcher, and Edward E. Bacon, for Respondent.

TAGGART, J.—Defendant Ryan was an employee of Robert Sherer & Co. and was joined with the members of that copartnership in an action for damages for forcible entry upon premises of which plaintiffs allege themselves to have been the owners and in the actual possession at the time of such entry, to wit, on February 2, 1906, and to and until February 14, 1906, and at divers times between said dates.

Ryan was served with summons February 20, 1906, and the members of Sherer & Co. served on February 21st and 23d, respectively. Sherer & Co. answered, but Ryan failed to do so, and on March 5, 1906, the default of Ryan for

not answering was regularly entered, and thereafter, on March 13, 1906, judgment was taken against him as prayed for in the complaint, to wit, for the sum of \$1,500 (the same to be trebled) and for costs.

On March 17, 1906, he served notice on plaintiff's attorney of his intention to move the court to set aside the said default and to permit him to answer the complaint filed in the action. The motion was noticed to be made on the records and files in said action and the affidavits of himself and attorney, and his verified answer to the complaint, a copy of which was served with the notice. The grounds specified were that "said defendant failed to answer in time through inadvertence, mistake *and* excusable neglect."

Appellants claim the order granting the motion was error for two reasons: 1. The grounds of the motion are stated conjunctively in the notice and both affidavits filed, and the showing made fails to support the conjoined reasons of inadvertence, mistake *and* excusable neglect; 2. The affidavit of merits is insufficient.

The affidavits are not to be construed with the strictness applied to a pleading in matters of form, and if they show facts to justify the action of the court on the ground of inadvertence, mistake *or* excusable neglect it will be sufficient. By the affidavits and verified answer the following facts are made to appear: That the Los Angeles Interurban Railway Company was the owner and in the peaceable possession of the premises described in plaintiff's complaint at the time of the alleged entry thereon by defendants, or, at least, that Ryan so believed. That Ryan was a laborer in the employ of his codefendants and it was in such employment he went upon said lands. That upon being served he called the attention of his employers to the service of summons upon him, and was told by them that he need not bother about the matter, as the suit would be taken care of by the Los Angeles Interurban Railway Company. That he relied upon such statement and filed no answer. Under the circumstances he had a right to rely upon the statement that the corporation whom he believed to be the real party in interest would protect him. The showing by the affidavit of Attorney Crutcher as to the reasons why he did not answer for defendant Ryan before his appearance to make the motion we do not think material.

The "records and files" upon which the motion was also based are not before us, but it does appear from the affidavit of Albert Crutcher that an answer had been filed on behalf of the defendants Sherer & Co. This was a circumstance that the court should have and no doubt did consider in the exercise of its discretion in the matter. That there were other pleadings before the court raising the same issues of fact as those which the defendant in default asked to have tried in his behalf might well and properly have influenced the court in case of doubt. It was authorized to examine them for the purpose of determining the motion. (*Lakeshore Co. v. Modoc Co.*, 108 Cal. 263, [41 Pac. 472].) The discretion of the court in vacating the default and setting aside the judgment thereon appears to have been liberally exercised with a view to the trial of the case on its merits. This was in accordance with the universal rule. (*Merchants' Co. v. Los Angeles Co.*, 128 Cal. 621, [61 Pac. 277].)

Neither of the affidavits filed contains a showing that alone would be sufficient as an affidavit of merits, but the verified answer denies every material allegation of the complaint. This has been held sufficient too often by the supreme court to be considered an open question. (*Fulweiler v. Mining Co.*, 83 Cal. 129, [23 Pac. 65]; *Merchants' Co. v. Los Angeles Co.*, 128 Cal. 621, [61 Pac. 277]; *Melde v. Reynolds*, 129 Cal. 314, [61 Pac. 932].)

Order appealed from affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 17, 1907.

[Civ. No. 353. Second Appellate District.—June 18, 1907.]

C. C. BAILEY, Respondent, v. AETNA INDEMNITY COMPANY, OF HARTFORD, CONNECTICUT, Appellant.

ATTACHMENT—BOND FOR RELEASE—UNDERTAKING TO PAY JUDGMENT—

COMMON-LAW BOND—RECITALS CONCLUSIVE.—An indemnity bond voluntarily given by the defendant to the sheriff to secure the release of an attachment levied on defendant's property, for which the writ of attachment provides, under section 540 of the Code of Civil Procedure, which recites the amount of plaintiff's claim, but which, in lieu of the form of undertaking provided for in that section, undertakes and promises "that in case the plaintiff recovers judgment in the action, defendant will pay to plaintiff the amount of whatever judgment may be recovered in said action, together with percentage, interest and costs," is substantially a bond to secure the release of an attachment under section 540, and would be valid at common law; and its recitals of the plaintiff's claim, and of the levy of the attachment and of the desire of defendant to release the same by the bond, are conclusive against the obligor, whether it be a statutory or common-law bond.

ID.—BOND FOR RELEASE CONTEMPLATED BY WRIT—ORDER OF COURT NOT REQUIRED.—Where the writ contemplates a bond to the sheriff for the release of attached property, as well as to prevent a levy thereof, no order of the court is essential to its effectiveness as a statutory or common-law bond, whatever its form, when voluntarily given for the purpose of procuring the release of an attachment levied upon defendant's effects.

ID.—SUBJECTION OF PROPERTY TO ATTACHMENT—AFFIDAVIT—VALIDITY OF WRIT.—In an action on the bond given to release the attachment it cannot be questioned whether the property released was subject to attachment or not, nor whether the affidavit for attachment was false or the writ invalid, under which the levy was made.

ID.—BOND FOR RELEASE NOT A STAY BOND—ACCRUAL OF CAUSE OF ACTION—EXECUTION UNSATISFIED.—A bond given to release an attachment, though in the form of an obligation of defendant to pay the judgment, does not operate as a bond to stay execution on the judgment, nor is an action thereupon an action on the judgment; and the cause of action on the bond accrues as soon as execution against the defendant has been returned unsatisfied, where no stay bond on appeal from the judgment was given to prevent such execution and return.

ID.—ACTION ON BOND—JUDGMENT ON PLEADINGS—MERITS.—In an action on the bond, a judgment on the pleadings is a judgment on the merits under our code.

- ID.—TRIAL—INSUFFICIENT ANSWER—CONCLUSIONS OF LAW—INSUFFICIENT DEFENSE—PROPER JUDGMENT UPON PLEADINGS.**—Where it appeared upon the trial that the denials of the answer were of mere conclusions of law, and that an affirmative defense to the original action on the ground of collusion, which failed to show the facts constituting it, or to show that there was any defense to the original action or any ability to supply upon a new trial evidence alleged to have been suppressed at the former action, states no defense, and where the defendant elected to stand upon the answer, a judgment upon the pleadings was properly rendered.
- ID.—INTRODUCTION OF EVIDENCE—SURPLUSAGE.**—The judgment having been rendered upon the pleadings, with a general finding that the averments of the complaint were true, the introduction of evidence at the trial became mere surplusage, and questions of its weight and admissibility are immaterial.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. W. P. James, Judge.

The facts are stated in the opinion of the court.

Drew Pruitt, Charles L. Batcheller, and Thomas C. Ridgway, for Appellant.

Sidney J. Parsons, and O. P. Widaman, for Respondent.

TAGGART, J.—This is an action to recover from the surety on an undertaking given to release an attachment the amount of the judgment rendered against the attached debtor.

Judgment was for plaintiff, and defendant appeals from the judgment, and from an order denying its motion for a new trial.

Plaintiff brought an action in the superior court of Los Angeles county against the Pacific Furniture and Lumber Company to recover judgment on two promissory notes with interest, and attorney's fees as provided therein, and on an account for work and labor. He caused an attachment to be issued and levied on the property of the said Pacific Furniture Company at the time the action was begun. On the same day (April 14, 1904) the defendant herein, the Aetna Indemnity Company, executed and delivered to the sheriff who held the attached property of the furniture company,

the instrument here sued on, and the attached property was released and the attachment discharged. On the trial in the attachment suit the indebtedness was admitted by the defendant furniture company, but it was claimed that it was not due by reason of the execution by plaintiff and certain other creditors of the furniture company of a certain contract for forbearance extending the time of payment to September 23, 1903. Findings on this issue were for plaintiff, and on the fifteenth day of June, 1905, judgment in his favor was rendered against the Pacific Furniture Company for the full amount claimed. The present action was begun July 24, 1905, to recover from defendant herein, as surety on the undertaking given to release the attachment, the amount of such judgment. Defendant set up the same defense pleaded in the attachment suit, and alleged that the issues so raised were not fairly tried because of collusion between plaintiff and the defendant in the attachment suit, and asks that they may be tried on its answer in this action.

In support of the appeal it is urged that it appears from the complaint that the action was prematurely brought because the judgment was not final under section 1049, Code of Civil Procedure; that there is no allegation of indebtedness from defendant to plaintiff; that the writ of attachment was void; that it was not alleged that any property was levied upon by virtue of said writ of attachment; and that if the writ of attachment was not void the property was not shown to have been released as required by law.

The instrument sued on is attached to and made a part of the complaint. The allegations as to the manner of its execution and delivery would justify the assumption that it was given pursuant to the provisions of sections 554 and 555 of the Code of Civil Procedure, although these sections are not named. Some of appellant's objections to the pleading are based upon the instrument being so given, and upon this theory it is urged that the complaint fails to state a cause of action because it does not allege a compliance with all the steps and proceedings taken under those sections. To avoid these objections respondent claims the instrument to be an undertaking given under section 540 of the Code of Civil Procedure.

An examination of the instrument itself shows that it is not strictly in the form required by either section 540 or section 555. The former section applies where the intention is to *prevent* the levy of an attachment, and the sheriff may accept an undertaking "in an amount sufficient to satisfy such demand (plaintiff's), besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached." The latter section (555) provides for the release of an attachment by the court. In which event the court must require an undertaking, "to the effect that in case the plaintiff recover judgment in the action defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released."

The instrument pleaded shows the title of the court and cause in which given, recites the claim and amount of plaintiff's claim against defendant, the issuance of the attachment and levy thereof on "certain property and effects of said defendant," and that defendant desires to release said property from the attachment; that the surety (defendant herein), in consideration of the premises and the release of the property attached, undertakes in the sum of \$4,350, "and promises that in case the plaintiff recovers judgment in the action defendant will pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage interest and costs."

The bond is not a forthcoming or delivery bond, but, as shown by its own provisions and the allegations of the complaint as a whole, was given to the sheriff under section 540 for the purpose of preventing a continuance of the levy upon or further holding of property which had already been attached. It is not strictly such an undertaking as that section directs him to take, but is an indemnity bond given for the benefit of plaintiff to secure the release of the property of defendant, and it accomplished that purpose. The condition of it is that the obligors will pay the judgment in consideration of the release of the attachment. It substantially conforms to the requirement of one clause of section 540 and the fair presumption, aided by the allegations of the com-

plaint, is that it was executed with reference to that section. It would be immaterial here under which section it was given, if it were not that the meaning and intentions of the parties are to be ascertained by the light of the statute. (*Heynemann v. Eder*, 17 Cal. 434.) Such an undertaking may be given either to prevent or to release an attachment (section 540; *Curia v. Packard*, 29 Cal. 200); if voluntarily given to the sheriff to secure a redelivery or release of the property attached it would be valid at common law (*Palmer v. Vance*, 13 Cal. 553), and its recitals are conclusive as against the obligor whether it be a statutory or common-law bond. (*McMillan v. Dana*, 18 Cal. 339, 347.)

Quoting approvingly from the opinion in the case last cited, the supreme court says, in *McCormick v. National Surety Co.*, 134 Cal. 513, [66 Pac. 741]: "Nor does it matter whether the property was subject to the attachment or not. That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that the sureties procured its release upon the stipulation that in consideration of such release they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit."

The same rules apply if the bond be considered as a common-law bond. Speaking of a bond given to release an attachment which was held not to have been given pursuant to either section 540 or section 555, Code of Civil Procedure, the supreme court says: "Whatever the obligor recites in a bond to be true may be taken as true against him, and need not be averred in a complaint on such bond, or proved on the trial." (*Smith v. Fargo*, 57 Cal. 157.) Whether the undertaking be in statutory form or good only as a common-law bond is immaterial. (*Gardner v. Donnelly*, 86 Cal. 372, [24 Pac. 1072].)

Considering the points urged by appellant in the reverse order of their mention, its contention that the attachment was not released as required by law is based upon the assumption that the undertaking was given under section 555 and an order of the court necessary for the release of the attached property. No order was required, as the writ of attachment itself directed the sheriff to take such an undertaking and either not attach, or release the property attached, as the cir-

cumstances required. The allegation of the complaint that the Pacific Furniture Company "appeared in said action" may be treated as surplusage. The defendant is estopped by the recitals in its own written obligation, the bond, from saying that no property was levied on by virtue of the writ of attachment.

The complaint alleges an indebtedness from defendant to plaintiff with sufficient clearness, and the case of *Provident Mutual etc. v. Davis*, 143 Cal. 253, [76 Pac. 1034], cited by appellant, has no application here. The recitals in the bond also conclude the defendant here as to the sufficiency of the affidavit upon which the attachment was based, and of the writ itself. That the former was false, or the latter did not state the amount of the plaintiff's demands in conformity with the complaint, cannot be questioned by defendant. If these matters, or either of them, were open to question at this time and in this manner, the rulings of the trial court in this connection would still have to be sustained. (*Porter v. Pico*, 55 Cal. 173; *Scrivener v. Dietz*, 68 Cal. 1, [8 Pac. 609]; *Harvey v. Foster*, 64 Cal. 296, [30 Pac. 849].)

This is an action on a bond and not on the judgment rendered in the action of *Bailey v. Pacific Furniture Co.* The bond was given to take the place of the security obtained by attaching certain personal property of the defendant in that action. The attachment issued and the property was seized that it might be available for the execution of the judgment which plaintiff expected to and did subsequently obtain against the Pacific Furniture Company in the superior court. Unless an appeal had been taken at once, and a stay bond given, the plaintiff could, and no doubt would, have proceeded to sell the property attached to satisfy the judgment of the superior court. This, it is admitted, could have been done, but it is claimed that it is so only because of express statutory authorization. It is provided by section 552 that if the execution be returned unsatisfied in whole, or in part, the plaintiff may prosecute any undertaking given pursuant to either section 540 or section 555; and the complaint alleges an execution was issued on the judgment and returned wholly unsatisfied.

The attachment proceeding is merely auxiliary to the main action (*Porter v. Pico*, 55 Cal. 173), and the latter would go

forward to execution whether the sheriff held the attached property or the undertaking given for its release. There is nothing in the statute to suggest that the bond given to release attachment shall operate as a stay bond to prevent execution on the judgment for six months after its entry. For the protection of the surety, it is required that an effort shall be first made to execute against the judgment debtor. Failing in this, the substitute for the attached property is immediately available and the bond may be enforced at once.

In *Cook v. Ceas*, 143 Cal. 221, [77 Pac. 65], claimed by appellant to be decisive of this case, the supreme court, on page 226 of the opinion, says: "The question, then, is reduced to this: When did the order settling the account of the guardian become a binding order?" The answer to this question was "Not until the time for appeal had passed." The question here is: When was execution on the judgment in the attachment suit enforceable? The answer is: As soon as entered (Code Civ. Proc., sec. 681), unless an appeal was taken at once and stay bond given. As well could it be said that it would be necessary to await the six months within which an appeal might be taken before a demand for the return of the property taken from the sheriff on a forthcoming bond could be made, or the redelivery of the property compelled. We think the case of *Cook v. Ceas* is easily distinguishable from the case at bar.

The findings and judgment recite: A trial of the cause before the court on its merits; the introduction of evidence by the plaintiff and by the defendant; that the latter sought to introduce testimony which was objected to on the ground that the answer failed to state a defense, and that the defendant thereupon announced that it elected to stand upon the answer as framed and declined to amend or offer further testimony. The transcript of the proceedings at the trial support these recitals in every particular. This, appellant contends, shows that the judgment was on the pleadings, and that, therefore, a new trial should be ordered that the findings on the evidence introduced may be stricken out and the judgment be made to declare on its face that it is based on the pleadings. Considering the judgment as one rendered on the pleadings (which it is), the conclusion suggested by appellant does not necessarily follow. There is but one finding

of fact by the court and that is the general one, that "each and every allegation contained in the plaintiff's complaint are true." This is but the express finding of that which is impliedly found by a judgment for plaintiff on the pleadings. A judgment on the pleadings is a judgment on the merits under our code. (Code Civ. Proc., secs. 581, 582.)

The ruling of the trial court as to the sufficiency of the answer was correct. The denials therein are of conclusions of law and of those matters as to which defendant is concluded by the recitals in the bond. The facts alleged in the affirmative defense are not sufficient to constitute either a defense or counterclaim. An answer claiming the relief here sought by defendant must show not only the facts constituting the fraud which prevented a fair judgment from being rendered in the former action, but it must also show that there was a good defense to the original action upon the merits and that the defendant will be able to present this defense upon a new trial. These matters must be alleged, not in the form of conclusions, or ultimate facts but in the same manner as the facts constituting the fraud; that is, the particular facts which were not presented upon the trial of the original action, by reason of the fraud complained of, must be set out, and accompanied by an allegation that the complaining party has the ability to produce evidence upon any new trial that may be granted to establish such facts as alleged. In reaching this conclusion we recognize the rule invoked by appellant, that each case of fraud must be determined upon its own circumstances. Here it is claimed that there was a collusive failure to introduce available evidence constituting a defense upon the original trial. The details of this failure should be pleaded and the ability of the defendant in this action to supply, upon a new trial, the evidence which was willfully suppressed upon the former trial should be clearly alleged. This is required to support a bill in equity to set aside a decree for fraud, or because of newly discovered evidence. The same rule is proper here. (*Hulford v. Cohn*, 18 Cal. 46, concurring opinion, Harrison, J.; *Whitney v. Kelley*, 94 Cal. 153, [28 Am. St. Rep. 106, 29 Pac. 624].)

The other objections to the court's rulings assigned as error need not be considered, as they relate to the introduction of

evidence and its sufficiency. The judgment being on the pleadings, the introduction of evidence becomes mere surplusage, and questions of its weight and admissibility are immaterial.

Judgment and order appealed from affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 357. Second Appellate District.—June 18, 1907.]

LINNA A. HIGGINS et al., Appellants, v. LOS ANGELES RAILWAY COMPANY, Respondent.

APPEAL—REVIEW—OPINION OF TRIAL JUDGE.—The reasons assigned in the opinion of the trial judge for his conclusions upon the final determination of a case constitute no part of the record upon appeal; and however erroneous the reasoning may be, error cannot be predicated thereon; and a proper ruling by the judge will not be disturbed because the court renders its conclusion by erroneous reasoning. If this court finds that upon any ground or for any reason the action of the court below is correct, such action will be affirmed, regardless of the reason which the court may have given for it.

ID.—AFFIDAVITS USED ON MOTION FOR NEW TRIAL—BILL OF EXCEPTION—RULE OF COURT.—Affidavits used on a motion for a new trial must be incorporated in a bill of exceptions, as required by rule XXIX of this court, else they cannot be considered on appeal from the order denying the motion.

ACTION FOR DEATH—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF DECEASED—SUPPORT OF FINDINGS.—In an action to recover for the death of a person alleged to have been caused by the negligence of the defendant, in which the negligence was denied and the contributory negligence of the deceased was put in issue, it is held that, notwithstanding a conflict in the evidence, there is sufficient evidence to sustain the findings that the defendant was not guilty of negligence, and that the deceased was guilty of contributory negligence.

ID.—EVIDENCE—SPEED OF CAR—RULINGS NOT PREJUDICIAL.—Where five witnesses had testified that the car was running at a speed not to exceed eight miles per hour, supposing, without holding, that objections sustained to two other witnesses as not experts, who were

asked as to the speed of the car, one of whom testified that it was running thirty miles per hour, were erroneous in view of the evidence as to independent contributory negligence, such rulings could not be prejudicial.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. G. A. Gibbs, Judge.

The facts are stated in the opinion of the court.

A. D. Warner, and Ansel Smith, for Appellants.

Bicknell, Gibson, Trask, Dunn & Crutcher, and Norman S. Sterry, for Respondent.

SHAW, J.—On the night of December 6, 1904, John T. Higgins, while crossing Central avenue at its intersection with Sixth street in the city of Los Angeles, was struck by an electric street-car operated by the Los Angeles Railway Company, receiving injuries which caused his death on the following morning. His widow in her own right and as administratrix of his estate, and also as guardian *ad litem* of his minor children, instituted this action against said railway company to recover damages claimed to have been sustained on account of his death. Judgment was rendered for defendant, from which, and an order denying a motion for a new trial, plaintiff prosecutes this appeal.

The complaint charges that the death of the deceased was due to the negligence of said railway company in making and leaving unprotected certain excavations along its tracks at the intersection of said Central avenue and Sixth street, into one of which excavations said Higgins stepped while attempting to cross said avenue in the night-time while the same was unguarded by signal lights and in the absence of any warning as to its dangerous condition, and from which he was unable to extricate himself before being struck by a car operated over the track at said point at a high, dangerous and reckless rate of speed, and thereby received injuries which caused his death.

The answer is a general denial, with an allegation that the death of said Higgins was due to his own carelessness and

negligence, which directly contributed to the collision which caused his death.

The transcript contains certain affidavits which purport to embody the opinion of the trial judge, delivered orally at the close of the trial. It is claimed that these affidavits incorporating this opinion were used in support of the motion for a new trial, and the reasoning of the trial judge in determining the case in favor of respondent is assigned as error and here strenuously urged as a ground for the reversal of the order denying appellant's motion for a new trial. The reasons assigned by the trial judge for his conclusions upon the final determination of a case constitute no part of the record on appeal. However erroneous the reasoning may be, error cannot be predicated thereon. Such an opinion may be cited and referred to in argument and thus be the means of assisting the court in reaching a correct solution of the questions submitted, but a proper ruling will not be disturbed because the court reaches its conclusions by a process of erroneous reasoning. "If this court finds that upon any ground or for any reason the action of the court below was correct, such action will be affirmed, regardless of the reason which the court may have given for it." (*White v. Merrill*, 82 Cal. 14, [22 Pac. 1129]; *Schwerdtle v. Placer County*, 108 Cal. 589, [41 Pac. 448].)

The affidavits cannot be considered on appeal from the order denying the motion for a new trial, because they are not incorporated in a bill of exceptions as required by rule XXIX of this court, which provides: "In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." The law provides no other mode; hence, their incorporation in a bill of exceptions is the exclusive method of presenting such affidavits to this court for its consideration upon an appeal from an order denying a new trial. (*Skinner v. Horn*, 144 Cal. 278, [77 Pac. 904].) The affidavits in question, as printed in the transcript (after title of court and cause), are entitled: "Affidavits of A. D. Warner, Linna A. Higgins, Joseph Tilley, on Motion for New Trial," and are indorsed: "Used on Motion for New Trial, G. A. Gibbs,

Judge." Following these affidavits there is printed in the transcript a counter-affidavit entitled: "Affidavit of Geo. A. Gibbs on Motion for New Trial," with a like indorsement. While it is reasonably certain that these affidavits were used at the hearing of the motion for a new trial, it does not appear that such affidavits were the only ones so used. (*Shain v. Eikerenkotter*, 88 Cal. 13, [25 Pac. 966]; *Spreckels v. Spreckels*, 114 Cal. 60, [45 Pac. 1022]; *Melde v. Reynolds*, 120 Cal. 234, [52 Pac. 491].)

Counsel for appellant, while contending in a general way that the evidence is insufficient to justify the findings, does not direct our attention to any specific finding thus unsupported, or point out wherein the evidence is insufficient. His argument is directed to a vigorous attack upon what he terms the "system of ratiocination" by means of which the learned trial judge arrived at his conclusion in deciding the case. As we have seen, this "system" is not a subject of review by this court.

The court, in effect, finds that the excavations made by the defendant in repairing its track were not large, deep or dangerous; that defendant placed lights at each excavation to warn travelers of its presence; that defendant was not negligent in making or leaving said excavations, nor in the manner of placing its lights to warn persons of the existence of the same; that the deceased did not step or stumble over or into any excavation, and that none of said excavations caused or contributed in any manner to the collision between deceased and the defendant's car. As to all of these findings there was, taking the most favorable view to appellant, a substantial conflict of evidence, and hence the finding of the court will not be disturbed. Having made the above finding, the court further found upon the issue of contributory negligence alleged in the answer, "that said collision between the said John T. Higgins and the said car of said defendant, and his death resulting therefrom, were caused wholly and entirely by the fault, carelessness and negligence of said John T. Higgins, and without any fault, carelessness or negligence upon the part of the said defendant or any of its servants, agents, or employees"; and further, by finding VIII, "that the said John T. Higgins was guilty of negligence which directly

and proximately contributed to the collision between himself and the said car, and his death resulting therefrom." In support of these findings, one Newton, who was walking north on Central avenue, testifying on behalf of plaintiff, says: "When I got within about fifty feet of 6th street I saw a car coming toward me on Central avenue, and I saw a man coming diagonally across 6th street. I saw the man by the light of the headlight. I think I was about fifty feet from him when he was hit." He further said that he could see the hole into which the man stepped from that distance, and that deceased was in as good a position to see the hole as he was. "*His range of vision,*" says the witness, "*was better than mine, and he ought to see it better than I did. The car was anywhere from eight to ten feet from the man when I first saw him.*" He further says that the man stumbled across a pile of dirt when he was *eight or ten feet from the car*; that the man seemed to stumble over a pile of dirt *between the two tracks*, there being double tracks on Central avenue, and the deceased having crossed the east track, the injury occurring on the west line of track upon which the car was traveling south. No other evidence was offered upon this point by plaintiff. The uncontradicted evidence of the motorman is, that he rang the gong twice as the car came into Sixth street; that the deceased was *ten to fifteen feet* in front of the car when he first saw him; that upon seeing him he rang the gong and shouted and applied the air hard to his brake; that deceased paid no attention, but jumped on the track in an attempt to cross, without increasing his pace, and when he reached the west rail of the west track the car hit him. Another witness, who was in the car, testified that he saw deceased suddenly walk into the rays of the headlight about *ten to fifteen feet* from the car and in the act of stepping across the east rail of the west track. Other uncontradicted evidence was to the effect that deceased seemed preoccupied and apparently unconscious of the near approach of the car; that "he didn't seem to see or hear anything. He seemed to be in deep thought. That was the appearance to me when he went between the tracks."

It thus conclusively appears by appellant's testimony the car was *eight to ten feet*, and by that of defendant, *ten or*

fifteen feet, distant from the point where deceased first stepped upon the east rail and was struck by the car when he had reached the west rail of the track. The headlight, plainly visible, and the ringing of the gong was notice and warning of the approach of the car, and the court might well conclude from the evidence that the deceased failed to exercise that degree of care and prudence ordinarily exercised by men possessing those qualities. The evidence justified the finding of the court as to contributory negligence on the part of appellant's intestate. (*Bailey v. Market Street Ry. Co.*, 110 Cal. 320, [42 Pac. 914]; *Portsmouth Street Ry. Co. v. Peed's Admr.*, 102 Va. 662, [47 S. E. 850]; *Jewett v. Paterson Ry. Co.*, 62 N. J. L. 424, [41 Atl. 707]; *Schwanewede v. North Hudson Ry. Co.*, 67 N. J. L. 449, [51 Atl. 696].)

As to errors excluding testimony, the court sustained defendant's objection, upon the ground that he was not an expert and no foundation was laid, to a question asked of witness Newton as to how fast the car was running at the time deceased was struck. Later the witness testified that the car was running twenty-five or thirty miles per hour. Conceding that the court erred in sustaining defendant's objection to the question asked as to the speed of the car when the collision occurred, it was cured by the fact that he subsequently answered it. (*Harrington v. Los Angeles Ry. Co.*, 140 Cal. 525, [98 Am. St. Rep. 85, 74 Pac. 15].) Witness Rowe was asked a similar question, to which the court sustained defendant's objection made upon like grounds. Admitting, but not holding, this ruling to be error, it could not have prejudiced appellant, in view of the finding that the injury resulting in the death of deceased was due to his own negligence. (*Wolf-skill v. Los Angeles Ry. Co.*, 129 Cal. 114, [61 Pac. 775]; *Sego v. Southern Pac. Co.*, 137 Cal. 405, [70 Pac. 279].) Five witnesses testified that the car was running at a speed not to exceed eight miles per hour. Had the testimony of Rowe upon this point been admitted, and conceding that his evidence and that of Newton had justified the court in finding that the car was running at a speed of twenty-five or thirty miles per hour, could such fact have warranted the court in finding otherwise than it did upon the question of contributory negligence? Assuming the evidence tendered by plaintiff as to the speed of the car, of the exclusion of which appellant

complains, had been admitted, deceased would still have been guilty of contributory negligence. It is manifest that the reception of this evidence could not have changed the result, and, therefore, appellant suffered no injury by reason of said ruling. (Code Civ. Proc., sec. 475; *Estate of Morey*, 147 Cal. 495, [82 Pac. 57].)

At the close of defendant's evidence, plaintiff called Alex Geddis in rebuttal and asked: "Was there any lights or lamps or lanterns anywhere at the intersection of 6th and Central avenue at that time (7:30 P. M.) that night?" The court sustained respondent's objection thereto upon the ground that the testimony sought to be elicited by the question was not rebuttal. In presenting her evidence in chief appellant offered several witnesses who testified to the absence of signal lights at the point in question. No excuse was suggested for not calling this witness at that time. The evidence tendered was not in rebuttal and no reason was offered calculated to appeal to the discretion of the court or which would warrant any other ruling than that made. (*Patterson v. San Francisco etc. Ry. Co.*, 147 Cal. 178, [81 Pac. 351].)

The order and judgment appealed from are affirmed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 355. Second Appellate District.—June 19, 1907.]

STIMSON MILL COMPANY, Appellant, v. M. J. NOLAN et al., Respondents.

C. G. BERG et al., Respondents, v. M. J. NOLAN et al., Defendants; N. S. WAKEFIELD, Cross-complainant; L. N. WISE, Cross-complainant and Appellant.

J. F. TILDEN, Appellant, v. M. J. NOLAN et al., Respondents.

FRICK-FLEMING HARDWARE COMPANY et al., Appellants, v. M. J. NOLAN et al., Respondents.

MECHANICS' LIENS—VOID CONTRACT—PRIOR COMMENCEMENT OF WORK—OMISSION TO PROVIDE FOR FINAL PAYMENT.—Where the work on a building to cost \$3,100 was commenced and materials furnished prior

to the execution and record of the contract, and it omitted to provide for the final payment of twenty-five per cent of the contract price at least thirty-five days after completion of the building, the contract is void as to all persons performing labor or furnishing materials on the building.

ID.—STATEMENT FOR BENEFIT OF CONTRACTOR—STATUTE NOT COMPLIED WITH.—The mere statement in the contract, for the benefit of the contractor, that the owner might pay the whole amount, when receipts were produced, cannot be construed as a substantial compliance with the statute as to the last payment, or even an attempt in that direction, where it appears that the whole contract price was payable upon completion, and the last payment was treated by the parties as the completion payment, the amount of which was depleted by the expenses of completion made necessary by the contractor's abandonment of the contract.

ID.—EQUALITY OF RIGHTS OF LIEN CLAIMANTS.—The court erred in refusing to award a lien for the full value of the material and labor to those who bestowed the same after the contract was filed. The constitutional provision which gives to mechanics, materialmen, artisans and laborers of every class a lien upon the property upon which they bestowed labor or furnished materials places such parties in the same class. Their equality is established by the constitution and cannot be impaired or destroyed by the legislature. One lien claimant cannot be preferred over others.

ID.—ATTORNEYS' FEES NOT ALLOWABLE.—Lien claimants cannot be allowed attorneys' fees in an action to foreclose their liens.

ID.—LIEN UPON STRUCTURE AND LAND CONSTITUTIONAL.—It is no infringement upon an existing right of property in the owner of land upon which a structure is placed by his own act to cause the lien given upon the structure to extend to the land necessary for its use.

ID.—EFFECT OF CODE SECTIONS—CONSTITUTION—RIGHTS OF OWNER OF PROPERTY.—Sections 1183 and 1184 of the Code of Civil Procedure, regulating the terms required for the validity of building contracts in excess of \$1,000, are not invalid, as impairing any existing right of the owner of the property. Those sections confer a right not previously existing, by which his liability is curtailed; if these sections did not exist or are not complied with, the constitution itself guarantees a lien to the full value of all labor or material bestowed or furnished. The owner cannot be injured, but is afforded security, if he honestly complies with those sections.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Borden & Carhart, W. C. Batcheller, A. L. & J. E. Stephens, and Charles L. Batcheller, for Appellants.

F. B. Guthrie, Frank James, E. A. Meserve, W. C. Petchner, and Scarborough & Bowen, for Respondents.

ALLEN, P. J.—Appeal from a judgment of the superior court of Los Angeles county.

It appears from the record that on or before June 22, 1903, defendant Nolan, the owner of the premises involved, and one Culver, a contractor, had concluded oral negotiations through which Culver had agreed to furnish materials and construct a house on said premises for the consideration of \$3,100. That on said last-named date Culver, with Nolan's consent, commenced the work of such construction, and certain lien claimants delivered upon the premises the brick necessary for the foundation, while others delivered upon the premises the lumber necessary for the construction. Thereafter, on June 26, Nolan and Culver entered into a written contract for the construction of the house, which was in all respects the same as the oral agreement. In this written contract the construction price of \$3,100 was made payable in four equal installments, of which three were to be paid during the construction, and the last "when the house was completed and receipts in full shown to the owner." After this contract had been executed, and such contract and an accompanying bond filed in the recorder's office, other lien claimants furnished materials and performed labor upon said building. The aggregate value of all materials and labor furnished by all claimants, on October 26, 1903, amounted to \$1,770. On this date the contractor abandoned the work.

The court finds that on and before the abandonment the value of the work and materials furnished under the contract upon the house, estimated as nearly as may be by the standard of the whole contract price here involved, amounted to \$2,520, and that the contractor had been previously paid by the owner \$2,325, leaving a balance of \$195 due, which the court found was the whole amount due from the owner to the contractor. The whole amount of expenditure required upon the part of the owner to complete the building is not made to appear. It appears that there was unpaid to the lien claimants on the 26th of October, 1903, on account of the materials furnished

and labor performed by them, the aggregate sum of \$1,062.94. It further appears that the building was completed December 1, 1903, and that thereafter and within due time all of these claimants duly perfected their liens. Various suits were instituted by these claimants upon their liens, all of which were consolidated and heard in this action.

Upon the trial, the court found the contract between Nolan and Culver a valid one as to all parties furnishing materials or performing labor after its filing, but inoperative as to those who furnished labor and materials before such filing; and further, that the omission to reserve twenty-five per cent of the contract price thirty-five days after completion did not invalidate the contract. Judgment was accordingly rendered in favor of the lien claimants who furnished labor and materials after the filing of the contract to the full extent of their claims. That Wakefield, one of the claimants, being a laborer and his claim being for labor, had preference and priority over the other claimants who furnished materials after the filing of the contract, and that claim, amounting to \$144.25, with costs for filing the lien and attorney's fees, was adjudged a preferred claim and the full amount thereof ordered paid; which payment exhausted all the money so found in the hands of the owner, and accordingly no relief was granted any of the remaining claimants.

The judgment of the trial court is erroneous for several reasons. First, because the court erred in holding the contract between the owner and contractor valid as affecting the rights of lien claimants. Section 1183, Code of Civil Procedure, provides: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth . . . the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the County Recorder of the county or city and county, where the property is situated . . . ; otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner,

and they shall have a lien for the value thereof." No surreptitious commencement of work is involved; hence, we have a deliberate violation of the provisions of this section, the effect of which is declared by the statute. To hold such a contract valid, under the circumstances of this case, is to ignore the plain provisions of a statute. The contract being void, those entitled to liens under the constitution are unrestricted in their rights to have a lien for the full value of materials and labor furnished. (*Laidlaw v. Marye*, 133 Cal. 174, [65 Pac. 391].)

Again, section 1184, Code of Civil Procedure, provides: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. . . . In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." In this contract so executed and filed after the commencement of the work there is an entire omission to provide for the final payment of twenty-five per cent thirty-five days after completion, which is intended for the benefit of lien claimants, and the mere statement in the contract, inserted for the benefit of the contractor, that the owner might pay the whole amount when receipts were produced, cannot be construed as a substantial compliance with the statute, or even an attempt in that direction. The whole contract price was made payable upon completion, and the last payment was treated by all parties to the contract as the completion payment; for the amount of such payment was depleted by the expenses of completion made necessary by abandonment. In *Hampton v. Christensen*, 148 Cal. 729, [84 Pac. 203], Mr. Justice Henshaw, speaking for the court, says: "Whatever

may be said of other payments, this amount of money (thirty-five day payment) cannot lawfully be depleted or reduced to the injury of any such claimant"; that out of the completion payment the necessary cost to the owner or completion, in case of abandonment, must be taken. "If such completion payment be more than exhausted by the demands of the owner, . . . the excess of such demand cannot be carried over and made a charge against the twenty-five per cent final payment, to the injury of any lien claimant thereon. . . . This final payment is the only fund which the legislature has sequestered to meet the demand of the lien claimants. To permit this (its depletion) would be to deprive them of their constitutional right to a lien." The court erred in refusing to award a lien for the full value of the material and labor to those who bestowed the same after the contract was filed.

The court erred in awarding Wakefield preference over other lien claimants furnishing materials and performing labor. The constitutional provision which gives to mechanics, materialmen, artisans and laborers of every class, a lien upon the property upon which they have bestowed labor or furnished materials, places such parties in the same class. Their equality is established by the constitution and cannot be impaired or destroyed by the legislature. (*Milimore v. Nofsinger Bros. L. Co.*, 150 Cal. 790, [90 Pac. 114].)

The allowance of an attorney's fee to the various claimants is also erroneous. (*Builders' Supply Depot v. O'Connor*, 150 Cal. 265, [88 Pac. 982].)

Respondent Nolan, in a supplemental brief, contends for the validity of the contract and urges in support thereof that section 15, article XX, of our state constitution, which guarantees to every laborer and materialman a lien upon a structure for the value of labor bestowed or materials furnished in its construction, is subordinate to section 1, article I of the same constitution, which declares that "all men are by nature free and independent, and have certain inalienable rights, among which are those of . . . acquiring, possessing and protecting property"; and that it is subordinate, also, to section 13, article I, which declares that "no person shall be deprived of life, liberty or property without due process of law."

Respondent properly insists that the inalienable right to acquire and possess property includes the right of contracting with reference thereto. Were we to concede the subordinate

character of section 15, still we are unable to appreciate the conflict, one with the other, which is suggested by respondent. The constitutional lien to the laborer and materialman is given upon the structure as the principal thing. (*Humboldt Lumber Co. v. Crisp*, 146 Cal. 686, [106 Am. St. Rep. 75, 81 Pac. 30].) The right to declare such a lien is based upon the theory that the materialman and laborer produce the thing upon which the lien is declared. (*Tuttle v. Montford*, 7 Cal. 359.) In *Jones v. Hotel Company*, 86 Fed. 370, [30 C. C. A. 108], it is said by the court, in relation to statutes creating similar rights of lien: "But the validity of the statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that everyone who by his labor or materials has contributed to the preservation or enhancement of the property of another thereby acquires a right to compensation." It is no infringement upon an existing right of property to require one who has procured another to create a structure to pay for the work and materials involved in such creation. When the owner of land makes such structure a part of the land previously owned by him, it is not inequitable or destructive of his rights to say that, having by his own act made this labor and material of another an inseparable portion of his land, the lien upon the building should extend to the land necessary for its use. Having made the building a part of his land, it became as such charged with the lien upon the structure. (*Linck v. Meikeljohn*, 2 Cal. App. 508, [84 Pac. 309].)

It is next contended that sections 1183 and 1184, Code of Civil Procedure, which provide the terms of valid contracts as affecting those in excess of \$1,000, are unconstitutional as an attempt to circumscribe the right of private contract within the usual pursuits of business, and are an unreasonable restriction upon the owner of his rights in regard to its use and upon his power to make contracts concerning the same, this contention being based largely upon the decisions of our own supreme court in *Stimson Mill Co. v. Braun*, 136 Cal. 123, [89 Am. St. Rep. 116, 68 Pac. 481], and *Gibbs v. Tally*, 133 Cal. 373, [65 Pac. 970]. We do not accept either of these decisions as determinative of the questions here involved. As-

suming, as we do, the validity of section 15, article XX, of the constitution, which guarantees the lien, we find that this constitutional right of the laborer and materialman extends to the full value of all labor and materials bestowed or furnished; and, without legislation, such value is the measure of recovery. The legislature has seen fit, under the authority given it by the constitution, to provide by the sections complained of certain conditions, upon the observance of which the constitutional measure of lien and recovery is restricted to the sum specified in the contract between the owner and contractor. There is no attempt to enlarge the rights of lien claimants under any circumstances, for under the sections mentioned, where a valid contract is made, the value of the thing furnished measures the extent to which any claim can be found. The effect, therefore, of these sections is not to impair any existing right of the owner, but, in effect, to confer a right not previously existing by which his liability may, under certain circumstances, be curtailed. The owner's liberty of action in relation to this property is not invaded by the statute. He need not employ an intermediary to erect his building, but if he does, the law ingrafts upon his act certain consequences. (*Henry v. Evans*, 97 Mo. 47, [10 S. W. 872].) There is no taking of property without due process of law. The contract by the owner is made voluntarily and with the constitution and laws in mind, and they form part of such contract; and he must be taken to have consented to the effect of such enactments. That similar rights are not conferred by the sections upon those who make improvements of nominal value and under \$1,000, is a matter of which respondent cannot complain. (*Ramish v. Hartwell*, 126 Cal. 451, [58 Pac. 920].) Nor can it be said that this statute can have the effect to increase the necessary cost of the structure simply because the contractor who bids thereon does so under provisions of the law which require reasonable restrictions as to the time and manner of his payment, for this same law insures to him a lien for his contract price which he otherwise would not have. Hence, it would be unreasonable to say that because of such a statute a contractor is injured, when the only effect thereof can be to afford him security when he honestly discharges the obligations imposed upon him by its terms.

Judgment reversed, and cause remanded for further proceedings in accordance herewith.

Shaw, J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 17, 1907.

[Civ. No. 404. Second Appellate District.—June 19, 1907.]

O. P. LANE, Petitioner, v. SUPERIOR COURT OF KINGS COUNTY, Respondent.

APPEAL FROM JUSTICE'S COURT—EFFECT OF FAILURE OF SURETIES TO JUSTIFY.—Upon an attempted appeal from the justice's court, where the sureties fail to justify when required to do so, the appeal must be regarded as if no undertaking had been given, and the cause remains in the justice's court until a new undertaking is filed or until the sureties justify.

ID.—ABSENCE OF JURISDICTION OF APPEAL—PROHIBITION.—In such case where the justification of the sureties was abandoned, and an undertaking was filed more than thirty days after the rendition of the judgment, the appeal is ineffectual, and the superior court has no jurisdiction thereof; and prohibition will lie to prevent the superior court from trying the case.

APPLICATION for writ of prohibition to the Superior Court of Kings County. John G. Covert, Judge.

The facts are stated in the opinion of the court.

Robert W. Miller, M. L. Short, and Wheaton A. Gray, for Petitioner.

T. M. McNamara, and R. J. Hudson, for Respondent.

TAGGART, J.—Application for writ of prohibition.

One David Bonham commenced an action in the justice's court of Lucerne township, Kings county, against petitioner

to recover \$200 as money had and received. Judgment was for defendant (petitioner here) for costs, and plaintiff appealed.

The judgment was rendered April 25, 1907, and on May 23, 1907, plaintiff served defendant with a notice of appeal to the superior court from said judgment. The same day he filed an undertaking on appeal reciting that his appeal was "from a judgment entered against him, in said action, in the said *Superior Court*," etc., and obligating the sureties in the sum of \$300, instead of \$100. On May 24th, the justice of the peace certified the records and papers in the case and filed them in the superior court. Defendant gave notice of exception to the sufficiency of the undertaking and of the sureties thereon on May 27, 1907, and on May 29th notice of intention of sureties to justify was served on defendant without time being fixed in the notice; after oral notice of the time and an adjournment of the hearing to May 31st, counsel for plaintiff in open court, on that date, stated that one of the sureties on the undertaking could not justify, and the court adjourned without any justification of any surety on that or any other undertaking.

Thereafter, on said thirty-first day of May, 1907, the plaintiff filed in the office of the clerk of the superior court an undertaking entitled: "In the Justice's Court of Lucerne Township, County of Kings, State of California," and in the cause mentioned, reciting that he has appealed "from a judgment made and entered against him in said action in the said *Superior Court*, in favor of the *plaintiff*" (himself), etc.

Notice of the filing of this bond as a new undertaking, and of the intention of the sureties thereon to justify before the superior court on June 1, 1907, was given to defendant the same day, and the latter appeared by counsel in the superior court at the time named in the notice and objected to the filing of a *new* undertaking on appeal in the said cause, on the grounds that no notice had been given defendant of the proceedings under which said undertaking was filed, and that the filing of a new undertaking and justification of sureties thereon was not authorized by law. The court overruled the objection and defendant excepted.

At the same time and place, all parties being in court by counsel, and notice being waived, defendant moved the dismissal of the appeal on the ground that the court had ac-

quired no jurisdiction of the case. He specified as reasons: That the original undertaking was fatally defective in that it described no judgment appealed from; that the sureties had failed to justify, and no other sureties had justified in their stead; that the new undertaking filed in the superior court more than thirty days after the rendition of the judgment in the justice court was ineffective. The superior court overruled this motion and set the case for trial June 20, 1907.

Petitioner (as defendant and respondent in that case) makes application to this court for a writ of prohibition to prevent the superior court of Kings county from proceeding with the trial of said cause.

We have stated the matter at length, since we think the mere statement of the facts give ample reasons for the issuance of the writ as prayed for.

Conceding the last undertaking filed to be sufficient in form and to have been filed in the proper court, it was ineffectual to perfect the appeal as it was not filed within thirty days after the rendition of the judgment. (Code Civ. Proc., secs. 974, 978; *Coker v. Superior Court*, 58 Cal. 178.) The justification of the sureties on the first undertaking having been abandoned, the appeal taken was "not effectual for any purpose" after May 25th (thirty days from the rendition of the judgment). The proceedings to justify on the only undertaking given within the statutory time extended that time only for the purpose of justification, and did not operate to give additional time within which a new and independent undertaking might be filed. The sureties having failed to justify, the appeal must be regarded as if no such undertaking had been given. (*Bennett v. Superior Court*, 113 Cal. 442, [54 Am. St. Rep. 354, 45 Pac. 684].) There was nothing before the superior court until the undertaking was filed, and, until the sureties justified, the cause remained in the justice's court. (*McCracken v. Superior Court*, 86 Cal. 76, [24 Pac. 845].) By the appeal attempted to be taken the superior court acquired no jurisdiction to entertain any proceeding in the case except a motion to dismiss the appeal.

It is unnecessary in ruling upon this application to determine whether or not the verified answer filed in the justice's court raised an issue involving the title or possession of real property. Conceding that it does, it would not give the superior court jurisdiction of the appeal here in question. None

of the authorities cited hold that a party can be brought within the jurisdiction of the court against his consent by any other than the statutory method.

In the case of *Santa Barbara v. Eldred*, 95 Cal. 378, [30 Pac. 562], an application for a transfer to the superior court was made to the police court on the statutory grounds provided by section 838 of the Code of Civil Procedure, and the application denied; the cause was tried by the police court and an appeal from the judgment taken to the superior court. The case was tried in the superior court without objection, and the question of whether the jurisdiction exercised by the superior court was original or appellate was under consideration by the supreme court on an appeal to that court from the judgment rendered by the superior court. The court says: "The police court had no jurisdiction to try the cause upon the merits, and it necessarily follows that the superior court had no appellate jurisdiction to try the cause at all. But the Superior Court had original jurisdiction of the subject matter, and . . . having jurisdiction over the subject matter, the court obtained jurisdiction over the parties when, *without objection*, they proceeded to trial upon the main issue. . . . The proper procedure would have been for the superior court to have set aside the judgment, and ordered the police court to remand the cause in accordance with section 838." There is nothing in the opinion in *Hart v. Carnall-Hopkins Co.*, 101 Cal. 160, [33 Pac. 633], to modify this statement of the law. (See, also, *Arroyo Co. v. Superior Court*, 92 Cal. 47, [27 Am. St. Rep. 91, 28 Pac. 54].)

In the case at bar, if a question of title or possession of real property be involved, the parties are not proceeding to trial *without objection*, and in such a case the superior court has no jurisdiction at all. Neither original by consent, or process, nor appellate because appellant failed to comply with the statutory requirements in attempting to appeal from the judgment in the justice's court.

It is proper, therefore, that a writ issue from this court prohibiting the superior court of Kings county from proceeding with the trial of said cause; and it is so ordered.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 203. First Appellate District.—June 20, 1907.]

PATRICK F. DILLON, Respondent, v. **C. W. CROSS**,
Executor of the Will of **PATRICK DILLON**, Deceased,
Appellant.

ACCOUNTING OF TRUST MONIES—PLEADING—ABSENCE OF DEMURRER TO COMPLAINT—INFERENTIAL AVERMENT—DEPOSIT IN BANK IN TRUST. In an action for an accounting of money alleged to have been delivered in trust by plaintiff to the defendant, although the complaint does not in direct terms allege that defendant accepted the money in trust, or agreed to keep, deposit or invest it for the plaintiff, yet, in the absence of any demurrer, it is sufficient that such essential fact appears inferentially from an averment that the defendant deposited a specified part of the money in a certain savings bank in trust for the plaintiff.

ID.—ACTION IN EQUITY—JURY TRIAL.—The court was justified in treating the action as one in equity, in which the defendant was not entitled to a jury trial.

ID.—CONTINUING TRUST—STATUTE OF LIMITATIONS—DEMAND AND REFUSAL.—Where the case made by the pleadings and the evidence was a continuing trust, the statute of limitations did not commence until demand and a refusal of the defendant to account for the money which occurred shortly before the action was begun.

ID.—FINDINGS—CONSISTENCY—MONEY PAID DURING MINORITY AND AFTER MAJORITY.—*Held*, that a finding that as to money paid by plaintiff to defendant during his minority, the defendant, who was plaintiff's father, did not relinquish his right to the money so paid, is not inconsistent with a finding that the money delivered to plaintiff after majority was delivered to defendant in trust, to be kept invested and deposited for plaintiff.

ID.—ACCOUNTING—PAYMENTS BY DEFENDANT—COUNTERCLAIM—COMPENSATION OF CROSS-DEMANDS.—In the accounting between the parties, payments made by defendant to plaintiff, defendant is entitled to credit for, though pleaded as a counterclaim, and the statute of limitations cannot apply to the right to such credits. The cross-demands must be deemed compensated so far as they equal each other, under section 440 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. **Frank H. Kerrigan**, Judge.

The facts are stated in the opinion of the court.

C. W. Cross, and Robert Harrison, for Appellant.

J. F. Riley, and Crittenden Thornton, for Respondent.

HALL, J.—Appeal from judgment and order denying defendant's motion for a new trial.

Plaintiff, Patrick F. Dillon, brought this action against Patrick Dillon, the father of plaintiff, for an accounting of moneys claimed to have been delivered to said defendant by plaintiff in trust to be held and invested for plaintiff, and for general relief. The cause was tried, and judgment rendered for plaintiff during the lifetime of defendant, who subsequently dying, the executor of his last will was substituted as party defendant. By the term "defendant," when used in this opinion, we refer to the original defendant.

The action was tried upon the issues raised by the amended complaint and the answer thereto, no demurrer having been filed to the amended complaint.

Before the case came on to be tried defendant made a demand that the cause be tried by a jury, but the court, taking the view that the action was one in equity, refused the demand for a jury, but allowed a jury as advisory to the court only, and made findings in favor of plaintiff, and gave judgment accordingly.

Acting upon the same theory as to the nature of the action, the court found that the action was not barred by the statute of limitations.

Appellant contends that the court erred in refusing a jury trial, and in finding that the action was not barred. Whether the court erred or not depends upon whether or not the complaint alleges a trust by defendant for plaintiff.

It is insisted that no trust is alleged. Although it is alleged that plaintiff handed to defendant various sums of money aggregating \$2,542 "to be kept, deposited and invested by him, the said Patrick Dillon, for this plaintiff, and to be returned to plaintiff on demand," and "that the said defendant, Patrick Dillon, did deposit of the said sums of money so received by him in trust for this plaintiff, in the Hibernia Savings and Loan Society in the City and County of San Francisco . . . the sum of about \$1,100," it is contended that it does not appear from the complaint that defendant accepted the money, or agreed to keep, deposit or invest it for plaintiff.

It certainly is not alleged in direct terms that defendant accepted the money, or agreed to keep, deposit or invest it for plaintiff, and if the complaint had been attacked by demurrer it must have been held bad. In the face of an attack by demurrer, especially by a special demurrer, it is not sufficient that essential facts be alleged inferentially or as a conclusion of law, but such facts must be directly stated. On the other hand, it has been uniformly held that, in the absence of a demurrer or an objection to offered evidence, a complaint that alleges an essential fact only inferentially or as a conclusion of law is good. (*Russell v. Mixer*, 42 Cal. 475; *Hill v. Haskin*, 51 Cal. 175; *City of Santa Barbara v. Eldred*, 108 Cal. 294, [41 Pac. 410]; *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, [43 Pac. 1111]; *Estate of Behrens*, 130 Cal. 416, [62 Pac. 603]; *Cushing v. Pires*, 124 Cal. 663, [57 Pac. 572]; *Penrose v. Winter*, 135 Cal. 289, [57 Pac. 772].)

In *City of Santa Barbara v. Eldred*, 108 Cal. 294, [41 Pac. 410], the complaint was attacked by a general demurrer, which was overruled. The court said: "He now specifies a great many alleged defects in the complaint. Many of them are, in effect, that the complaint is ambiguous or uncertain. Such objections cannot be reached by general demurrer. Nor can the other objections, which merely amount to criticisms upon the sufficiency of the statement, as that the essential facts appear only inferentially, or as conclusions of law, or by way of recitals, prevail on such demurrer. There must be a total absence of some material fact to justify us in sustaining a demurrer of this character."

In the complaint before us, after alleging that plaintiff handed to defendant moneys to be kept, deposited and invested by him, the said Patrick Dillon, for plaintiff, it is alleged that defendant did deposit in a bank \$1,100 "of the said sums of money so received by him in trust for this plaintiff." It is thus inferentially alleged that defendant received the money in trust for plaintiff. In paragraph V of the complaint the money is repeatedly referred to as money held in trust for plaintiff by defendant. It thus appears that plaintiff was attempting to charge defendant as a trustee; and while the complaint is uncertain for not alleging directly what is alleged inferentially, it is not a case of a total absence of allegations of essential facts going to charge a trust. It should

have been attacked by demurrer, when it doubtless would have been amended.

The mere demand that the case be tried by a jury was not sufficient to point out the defect now complained of, and the court was justified in treating the action as one in equity, and defendant was not entitled to a jury trial.

The case made by the pleadings and the evidence was a continuous trust, and the statute of limitations did not commence to run until demand and a refusal to account for the money, which occurred shortly before the action was begun. (*Baker v. Joseph*, 16 Cal. 173.)

Appellant concedes that the evidence supports the findings save in one respect. The court found that as to money delivered by plaintiff to defendant prior to the second day of December, 1892 (during the minority of plaintiff), defendant never relinquished the right he had thereto by reason of the minority of plaintiff—but also found as to the money delivered by plaintiff to defendant subsequent to said date that the same was delivered to defendant in trust to be kept, invested and deposited for plaintiff. Appellant urges that the only evidence of any agreement whereby defendant promised or agreed to keep, or deposit or invest any money for plaintiff, was of an agreement entered into in 1888. He argues that the finding of the court in favor of defendant as to the money delivered prior to plaintiff's majority necessarily determines that the evidence of such agreement was false, and that, as a result, no evidence is left to support the finding in favor of plaintiff as to the money delivered to defendant after plaintiff's majority. In other words, the appellant admits that if the court had found in favor of plaintiff as to all the money delivered to defendant, such finding would have been supported by the evidence; but because the court in part found in favor of defendant, the finding in favor of plaintiff cannot stand.

We cannot agree with this contention. It requires too nice an examination into the mental processes by which the trial court arrived at its conclusions. If the evidence was sufficient to sustain a finding in favor of plaintiff as to all the money in question, it was sufficient to sustain such finding as to a part thereof.

This disposes of the principal points in the case, and leaves but one other question to be considered.

Defendant pleaded in his answer, "by way of counterclaim and otherwise," that during the years 1900 and 1901 "defendant loaned, gave and intrusted to the said plaintiff various sums of money aggregating, to wit, \$390; none of which sums have been returned or repaid to said defendant."

Upon the objection of plaintiff, however, the court struck out the evidence of defendant tending to support this allegation, upon the theory apparently that it was a counterclaim, and as such was barred by the statute of limitations. In this we think the court erred. The plaintiff claimed and had testified that at the time defendant claimed to have advanced money to plaintiff, defendant held large sums of money belonging to plaintiff, for which he was asking defendant to account in this action, and the court was then engaged in effect in taking an account between these parties. If defendant, during the existence of this trust, had advanced money to plaintiff, either out of the trust moneys or out of his own money, the plainest principles of justice and equity require that in such accounting he should be allowed credit therefor. "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other. . . ." (Code Civ. Proc., sec. 440.)

Plaintiff at the oral argument stipulated in open court that if this court should be of the opinion that the evidence should have been allowed, that we might order such a modification of the judgment as should give the defendant the full benefit of the matter alleged and attempted to be proved. The amount alleged by defendant to have been by him advanced to plaintiff is \$390. The court charged defendant with interest at varying rates to February 19, 1902, and from that date to entry of judgment at seven per cent. With the aid of counsel, we have calculated the interest on \$390, from January 1, 1901, to February 1, 1902, at three and three-quarters per cent, the highest rate charged against defendant up to the latter date, and find that the principal and interest then amounted to \$405.85, which, at seven per cent up to the date of the entry of the judgment, would make the principal and interest amount to \$455.91.

The judgment is therefore modified, by deducting therefrom the sum of \$455.91 as of the date of the entry thereof, and as

so modified it is affirmed, and the order denying the motion for a new trial is likewise affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 358. Second Appellate District.—June 20, 1907.]

H. C. DEMING, Appellant, v. F. G. GAMBLE, Administrator, etc., of MANNIE DEMING, Deceased, Respondent.

ACTION BY HUSBAND AGAINST DECEASED WIFE'S ADMINISTRATOR—COMMUNITY PROPERTY—EVIDENCE—ADMISSIONS OF HUSBAND—WAIVER OF LETTERS—ERROR.—In an action by the husband against the administrator of his deceased wife, to establish that real property standing in the deceased wife's name was paid for with community funds, and was community property, where the court found that one lot was held in trust for the community, but that another lot was conveyed by the husband to the wife as a gift, and all the evidence tending to rebut that of plaintiff was in the nature of admissions by him against interest, and the oral evidence of such admissions was conflicting, it was prejudicial error to admit a waiver of letters by the husband, and request for defendant's appointment, appended to a petition for letters, stating that such other lot was the property of the deceased at the time of her death, without preliminary proof that the husband had read the petition and knew its contents when he signed the waiver.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. W. P. James, Judge.

The facts are stated in the opinion of the court.

Valentine & Newby, for Appellant.

Geo. P. Adams, and Hugh J. Crawford, for Respondent.

ALLEN, P. J.—Appeal by plaintiff from a judgment and an order denying a new trial.

This action was brought by the plaintiff against defendant as administrator of the estate of plaintiff's deceased wife,

the object of which was to have it adjudged that certain premises, to wit, lot 44, Park Villa tract, and lot 45, Angelus Vista tract, in Los Angeles city, all of which stood in the name of the wife at her decease, were community property. The court found that all of the premises described were purchased by the husband and the purchase money paid by him out of the funds of the community, and that the principal part of the improvements upon lot 45 had been paid for by him after the decease of the wife; that as to lot 44, the title was in the wife in trust for the community, but that lot 45 was conveyed to the wife by way of gift from the husband and was her separate estate. From this judgment in favor of defendant as to the said last-mentioned lot, and from an order denying a new trial, plaintiff appeals upon a bill of exceptions.

All of the evidence introduced by defendant tending to rebut that of plaintiff, in his effort to overcome the presumption created by the deeds, was in the nature of admissions of plaintiff against interest made before and after the decease of the wife. The trial judge, under objections and exceptions, permitted the defendant to introduce in evidence a petition for letters of administration signed and sworn to by defendant, in which petition it is stated that lot 45 was the homestead of deceased, and was her property at the time of her decease, and of the value of \$11,000. To this petition was attached a written waiver on the part of the husband, plaintiff herein, of his right to administer and a request for defendant's appointment. There was no preliminary proof tending to show that plaintiff had ever read the petition signed by defendant, or had knowledge of its contents, when he signed the waiver so attached. The appointment and qualifications of defendant as administrator were not in issue. The court in overruling the objections made to the introduction of this paper upon the grounds of its immateriality and incompetency must be taken as having considered that the statement of ownership therein made by the defendant was material and competent, and that plaintiff by signing the waiver thereto attached became bound by such declarations. We think the court erred in admitting this paper writing in evidence. The waiver signed by the husband is not a part of the petition, and that it was thereunto attached was of no significance. The waiver might well have been upon a separate instrument, in which event there would be no room for

controversy in relation to the admissibility of the petition. The mere appending of the waiver to an instrument, the contents of which were unknown, could not have the effect to conclude the party signing the waiver as to the facts alleged in the petition.

The oral evidence appearing in the record is most conflicting, and we cannot say from such record that the findings of the court as to the separate character of this lot 45 would have been the same had this petition not been considered and due weight given it as an admission against interest. The error, therefore, in our opinion, was prejudicial.

The judgment and order are reversed and cause remanded for a new trial.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 870. Second Appellate District.—June 20, 1907.]

S. A. NELSON, Appellant, v. F. W. McCARTY, Respondent.

NEGLIGENCE—FIRING SHOT BY POLICE OFFICER AT RUNAWAY HORSE—

INJURY TO PLAINTIFF—APPEAL—CONFLICTING EVIDENCE.—In an action to recover for an alleged injury to the plaintiff, by the negligent firing of a shot by defendant as a police officer at a runaway horse, where it appears that two other shots were fired at the horse by other persons about the same time, and that there is ample evidence in the record to justify the court in finding that the shot fired by defendant was not the cause of the injury to plaintiff, notwithstanding a conflict in the evidence, the finding for the defendant cannot be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

L. E. Dadmun, for Appellant.

T. L. Lewis, and Daney & Lewis, for Respondent.

ALLEN, P. J.—Appeal by plaintiff from a judgment in favor of defendant, and from an order denying a new trial.

This action is one for personal injuries alleged to have occurred through the wanton, reckless and negligent act of defendant in firing a revolver toward and in the direction of plaintiff, by reason whereof he was wounded and injured. The answer, among other things, denies the firing of any revolver or firearm by defendant toward or in the direction of plaintiff, or the wanton, reckless or negligent firing of a revolver at any time, or in any direction whatever by defendant; and denies that any bullet fired or discharged from the revolver of defendant hit or injured the plaintiff. The cause was tried by the court without a jury, and the court found that the defendant did not at the time alleged in the complaint, or at any other time, or at all, carelessly or negligently fire or discharge any revolver toward or in the direction of plaintiff, or on the date mentioned or at any time carelessly, wantonly, recklessly, or negligently fire or discharge any revolver or other firearm; that no bullet fired or discharged by the defendant from his revolver or any other revolver or other firearm fired by defendant, struck said plaintiff or entered said plaintiff's leg.

From the bill of exceptions, it appears that a horse attached to a buggy, in which was seated a woman, was running at a great rate of speed through the public streets of San Diego; that the bridle of such horse had become disarranged and the woman had lost all control over the animal; that the defendant was a policeman in the city of San Diego and fired a shot from a revolver at the horse for the purpose of so disabling it as that it might be gotten under control. It further appears from the record that another shot was fired by another policeman at the same horse about the same time; and there is evidence in the record tending to show that a third shot was fired at the horse within the same block. That plaintiff was injured by a bullet from one of the three shots is not to be questioned. But there is ample testimony in the record to justify the court in finding that the shot fired by defendant was not the cause of any injury to plaintiff. There is some testimony which indicates that, from the very situation of the parties at the time of the firing of the shot by defendant, it was not possible for the shot fired from his revolver to have in any wise affected the plaintiff. The most that can

be said in favor of appellant's position is that there is some conflict in the testimony; but the rule is well established that, where the testimony is conflicting, an appellate court in support of the decision of the court below will construe the testimony as favorably as possible for the respondent, and will not disturb a judgment or verdict when there is substantial conflict in the testimony, even though the appellate court may consider it greatly against the weight of the evidence. Under this rule, it is unnecessary for us to discuss any other questions presented upon the appeal.

The judgment and order are affirmed.

Shaw, J., and Taggart, J., concurred.

INDEX.

ACCORD AND SATISFACTION. See Contract, 30.

ACCOUNT.

1. **ACTION AGAINST ADMINISTRATRIX—REJECTED CLAIM—EVIDENCE—BOOK OF ACCOUNTS.**—In an action against the administratrix upon a rejected claim for meals furnished and money loaned to the decedent, the plaintiff's book of accounts was properly admitted in evidence to show the number of meals furnished to the employees of the deceased at his request, in connection with evidence tending to show that it was a book of original entries, and was fairly and honestly kept. What credit was to be given to the entries was for the trial court to determine. (*Yick Wo v. Underhill*, 519.)
2. **BOOK KEPT IN CHINESE CHARACTERS—TRANSLATION.**—Where the book of accounts was kept in Chinese characters, there was no error in permitting a witness to translate its entries to the court. (*Id.*)
3. **CORROBORATION OF ACCOUNT.**—*Held*, that there was evidence in the record outside of the book of account which tended to sustain the finding of the court as to the value of the meals furnished; and that the court properly allowed one of the employees of the deceased to testify that he was paid a fixed sum and his board by the deceased, and that this board was furnished by plaintiff. (*Id.*)
4. **MONEY LOANED—BOOK OF ACCOUNTS—SUFFICIENCY OF EVIDENCE.**—An entry in the book of accounts is not proof of money loaned; but it is sufficient to sustain a finding thereupon that there is ample proof outside of the book to show that plaintiff made the loan, and that it was unpaid. (*Id.*)

See Bill of Particulars; Corporations, 6, 7; Statute of Limitations,

ACCOUNTING. See Agency, 4-9; Trust, 4-8.

AGENCY.

1. **PRINCIPAL AND AGENT—AUTHORITY OF TRAVELING SALESMAN—WARRANTY OF QUALITY OF GOODS—ADJUSTMENT OF BREACH ON SECOND ORDER.**—Though a traveling salesman and soliciting agent has authority to bind his firm as principal by a warranty of the quality of goods sold under his order by the firm, he has no authority, after such goods have been sold and paid for, to determine a breach of warranty and adjust the breach by agreeing that the goods are

AGENCY (Continued).

sold may be retained, and their price deducted from a second order. His authority to sell is limited to a sale for cash only. (*Lindow v. Cohn*, 388.)

2. **REMEDY FOR BREACH AGAINST PRINCIPAL.**—The remedy for the breach of the warranty of quality by the agent is an action by the buyer to recover damages therefor against the principal whose goods were sold through the agent to the buyer. (*Id.*)
3. **ACTION UPON SECOND ORDER BY ASSIGNEE—FINDINGS AGAINST EVIDENCE—AUTHORITY—RATIFICATION.**—In an action by an assignee upon the second order obtained by the agent which was filled by the principal, findings that the agent was authorized to receive the former goods in exchange, and that the principal ratified the adjustment of the breach of warranty by the agent, are held to be against the evidence. (*Id.*)
4. **ACTION FOR ACCOUNTING—PLEADING—FINDINGS—AGENCY FOR RESALE OF PROPERTY—CONVERSION—SURPLUSAGE—CAUSE OF ACTION NOT CHANGED.**—In an action for an accounting under an agreement for resale by defendant of property before sold by him to plaintiff, and intrusted to defendant as agent for resale, where it appears that a portion of the property was resold, and the complaint and evidence and findings support the cause of action for an accounting, an averment and finding that the property not resold was misappropriated by defendant to his own uses, do not change the cause of action to one of tort for conversion, but are immaterial and may be disregarded as surplusage. (*Allsopp v. Joshua Hendy Machine Works*, 228.)
5. **LIABILITY OF AGENT TO ACCOUNT—ABUSE OF TRUST—COMMINGLING OF MACHINERY.**—The defendant having undertaken as agent for plaintiff to sell mining machinery intrusted to it for resale, and having returned some of it to persons from whom it was purchased and received credit therefor, and having in abuse of its trust, commingled the residue of the machinery with its own stock, so that its identity was substantially lost, and having sold it as its own, it may properly be held liable to account as of the date when the property was intrusted to it for resale. (*Id.*)
6. **AGENT BOUND TO UTMOST GOOD FAITH.**—An agent is charged with the duty of acting in the utmost good faith for the promotion of the interests of the principal. (*Id.*)
7. **DEMAND BEFORE SUIT FOR ACCOUNTING.**—Where an agent has been guilty of a breach of duty in failing to notify the principal of money collected, or has converted the property to his own use, there is no necessity of a demand before suit for an accounting; but where the plaintiff alleged and proved a demand and refusal of the defendant to account, the requirements of the law were satisfied. (*Id.*)

AGENCY (Continued).

8. **STATUTE OF LIMITATIONS—PLEADING—EXPRESS TRUST—CONCEALED BREACH.**—The statute of limitation applicable to an accounting between an agent and the principal is section 343 of the Code of Civil Procedure, and cannot be invoked if not pleaded; nor could the statute begin to run, the relation being one of express trust, where no knowledge of a repudiation of the trust relation was brought home to the knowledge of the principal, but the breach of trust was concealed from him. (Id.)
9. **VALUE OF PROPERTY INTRUSTED—ESTOPPEL—SUPPORT OF FINDING.**—Upon general principles of equity, the defendant should be estopped from contending that the value of the property intrusted to it for resale was less than the amount paid therefor by plaintiff to defendant, and the evidence is held to sustain a finding that there was no difference in value. (Id.)
10. **VENDOR AND PURCHASER—CONTRACT TO SELL—COMPENSATION OF AGENT.**—A contract by plaintiff with defendants, by which they were authorized to sell the plaintiff's real estate for \$1,000, or such less sum as plaintiff may take, and giving to defendants, as remuneration, all sums in excess of the amount stipulated for sale, does not give to the defendants an option to purchase, but is a contract of agency, under which the defendants were bound to act in the utmost good faith. (Tate v. Aitken, 505.)
11. **BAD FAITH OF AGENT—MISREPRESENTATION TO PROCURE LARGER COMMISSION—DEED TO AGENT.**—Where the plaintiff's agents had a contract to sell plaintiff's property for \$1,300, and, to procure a larger commission, misrepresented to plaintiff that \$800 was all they could get for the property, and thereby induced plaintiff to deed the property to them, for sale at that price, they acted in bad faith, and plaintiff is entitled to recover the remainder of the \$1,000 from them. (Id.)
12. **SIGNATURE BY PLAINTIFF'S WIFE—AUTHORITY—RATIFICATION—AGENCY OF DEFENDANTS FOR PLAINTIFF.**—Where the plaintiff authorized his wife to sign the contract with defendants during his absence, making them their agents to sell the land upon the terms agreed upon, with the understanding with them that he would afterward sign it, and the employment of the defendants was ratified by the husband's execution of the deed to them by reason of the defendants' misrepresentation, the defendants were properly found to be the agents of the plaintiff. (Id.)

See Banks; Checks, 4-6.

APPEAL.

1. **APPEAL FROM PART OF JUDGMENT—VACATION OF TEMPORARY INJUNCTION—TIME FOR APPEAL—MOTION TO DISMISS.**—An appeal taken

APPEAL (Continued).

from that part of a final judgment wherein it is adjudged "that the temporary injunction heretofore issued herein to the sheriff of the county be and the same is hereby vacated," is not taken from an order within the meaning of section 939 of the Code of Civil Procedure; and it will not be dismissed on the ground that it was not taken within sixty days. (*Bekins v. Dieterle*, 586.)

2. **AMBIGUOUS UNDERTAKING—DISMISSAL.**—Where the notice of appeal was from the judgment and from an order denying a new trial, and the only undertaking filed was conditioned to "pay all costs and damages which may be awarded on the appeal or on a dismissal thereof, not exceeding three hundred dollars," it is not possible to determine which appeal is referred to in the undertaking; and it is so ambiguous that it must be regarded as if none had been filed and both appeals must be dismissed. (*Commercial Bank of Santa Ana v. Wells*, 473.)
3. **LAPSE OF TIME TO APPEAL FROM ORDER.**—The motion of appeal having referred both to the judgment and order, each of which was appealable, the fact that the time had lapsed for taking an appeal from the order is of no consequence. (*Id.*)
4. **NEW UNDERTAKING NOT PERMISSIBLE.**—To permit a new undertaking to be filed would be in effect to permit a new appeal to be perfected after the time fixed by law; and an application therefor must be denied. (*Id.*)
5. **DISMISSAL—FAILURE TO FILE TRANSCRIPT IN TIME.**—An appeal from a judgment must be dismissed for a failure to file the transcript on appeal within forty days after the appeal is perfected if no proceeding is pending for the settlement of a bill of exceptions or statement to be used on the appeal. (*Prine v. Duncan*, 433.)
6. **DISMISSAL OF PENDING PROCEEDINGS—LAPSE OF TIME.**—Where all pending proceedings to settle a statement on motion for a new trial and all proceedings on the motion were dismissed, and more than forty days thereafter had elapsed without filing a transcript on appeal from the judgment, and no appeal from the order was taken within the time prescribed by law, and there is no answer to the motion to dismiss the appeal from the judgment, it must be dismissed. (*Id.*)
7. **ORDER APPOINTING RECEIVER—FAILURE TO SERVE NOTICE UPON "ADVERSE PARTY"—DISMISSAL.**—In an action by the plaintiff to enforce an agreement in relation to a trust fund in which plaintiff and defendants were beneficiaries, in which a receiver of the fund was appointed, upon appeal by part of the defendants from the order appointing the receiver, a codefendant, who was a party to the order, and whose interest in the fund will be affected by the reversal or modification of the order, is an "adverse party" who

APPEAL (Continued).

must be served with the notice of appeal, and for failure to serve him therewith the appeal must be dismissed. (*Ford v. Cannon*, 185.)

8. **REVIEW—OPINION OF TRIAL JUDGE.**—The reasons assigned in the opinion of the trial judge for his conclusions upon the final determination of a case constitute no part of the record upon appeal; and however erroneous the reasoning may be, error cannot be predicated thereon; and a proper ruling by the judge will not be disturbed because the court renders its conclusion by erroneous reasoning. If this court finds that upon any ground or for any reason the action of the court below is correct, such action will be affirmed, regardless of the reason which the court may have given for it. (*Higgins v. Los Angeles Ry. Co.*, 748.)
9. **AFFIDAVITS USED ON MOTION FOR NEW TRIAL—BILL OF EXCEPTION—RULE OF COURT.**—Affidavits used on a motion for a new trial must be incorporated in a bill of exceptions, as required by rule XXIX of this court, else they cannot be considered on appeal from the order denying the motion. (*Id.*)
10. **NEW TRIAL—AFFIDAVITS—BILL OF EXCEPTIONS—REVIEW UPON APPEAL—STIPULATION.**—Affidavits used on a motion for a new trial cannot be considered on appeal from an order denying the motion, where they are not incorporated in a bill of exceptions authenticated as required by rule XXIX of this court, and a stipulation of attorneys to the correctness of the transcript cannot take the place of such authentication, whether it includes the affidavits or not, especially where it does not thereby or otherwise appear that they constituted all the affidavits and papers used on the hearing. (*Manuel v. Flynn*, 319.)

See *Husband and Wife*, 1; *Injunction*, 3, 6; *Judgment*, 11-13; *Justice's Court*, 1, 2, 4; *Mechanics' Liens*, 7; *New Trial*; *Pleadings*, 2, 3; *Prohibition*; *Stare Decisis*.

ARREST. See *False Imprisonment*.

ASSAULT. See *Criminal Law*, 1-12.

ASSIGNMENT. See *Contract*, 28, 29; *Party-wall*, 5, 8.

ATTACHMENT.

1. **MOTION TO DISSOLVE—INSUFFICIENT COMPLAINT—DEFECT NOT CURED.**—Though a motion to dissolve an attachment cannot be made to serve the purposes of a demurrer to the complaint, and an amended complaint will support it if a defective complaint has been cured by amendment, yet, if the complaint fails to state a cause of

ATTACHMENT (Continued).

action, and is incurable, or if the plaintiff fails to amend an insufficient complaint before decision of the motion, it will be presumed that he cannot do so, and, in either case, the attachment must be dissolved. (*Pinkiert v. Kornblum*, 522.)

2. **COMPLAINT SHOWING MONEY PAID UNDER CONTEST FOR SHARES OF STOCK NOT DELIVERED—ALTERNATIVE REMEDY—RESCISSION—DAMAGES.**—Where the complaint shows that plaintiff fully paid money under a contract for shares of stock, which were not delivered, it might state a cause of action entitling plaintiff to rescind the contract for failure of consideration under section 1689 of the Civil Code, in which case he would be entitled to judgment for the return of the money paid, or to affirm the contract, and recover damages for its breach, measured by section 3336 of the Civil Code. (*Id.*)
3. **COMPLAINT FOR DAMAGES INSUFFICIENT TO SUPPORT ATTACHMENT.**—If the complaint stated a full cause of action to recover damages for the breach of the contract, which it fails to do, it could not, in such case, support an attachment for that cause of action. (*Id.*)
4. **INSUFFICIENT COMPLAINT FOR RESCISSION.**—If the complaint be considered as a complaint to rescind the written contract for failure of consideration, it is insufficient as lacking allegations to show that the time for performance of the contract on defendant's part, in which to cause the stock to be issued in a proposed corporation then in process of formation, had elapsed before his refusal of performance or to show the stage of its organization, or when or where it was to be organized. (*Id.*)
5. **REASONABLE TIME FOR PERFORMANCE—TWENTY DAYS NOT SUFFICIENT AS MATTER OF LAW—FACTS MUST BE AVERRED.**—The defendant was entitled under the contract, which fixed no time for performance, to a reasonable time therefor. It cannot be said as matter of law that twenty days after date of the contract was a sufficient time in which to procure the issuance of the stock, and any facts showing the contrary or that the failure was caused by defendant's act, must be alleged. (*Id.*)
6. **BOND FOR RELEASE—UNDERTAKING TO PAY JUDGMENT—COMMON-LAW BOND—RECITALS CONCLUSIVE.**—An indemnity bond voluntarily given by the defendant to the sheriff to secure the release of an attachment levied on defendant's property, for which the writ of attachment provides, under section 540 of the Code of Civil Procedure, which recites the amount of plaintiff's claim, but which, in lieu of the form of undertaking provided for in that section, undertakes and promises "that in case the plaintiff recovers judgment in the action, defendant will pay to plaintiff the amount of whatever judgment may be recovered in said action, together with percentage, interest and costs," is substantially a bond to secure the release of an attachment under section 540, and would be

ATTACHMENT (Continued).

valid at common law; and its recitals of the plaintiff's claim, and of the levy of the attachment and of the desire of defendant to release the same by the bond, are conclusive against the obligor, whether it be a statutory or common-law bond. (*Bailey v. Aetna Indemnity Company, of Hartford, Connecticut, 740.*)

7. **BOND FOR RELEASE CONTEMPLATED BY WRIT—ORDER OF COURT NOT REQUIRED.**—Where the writ contemplates a bond to the sheriff for the release of attached property, as well as to prevent a levy thereof, no order of the court is essential to its effectiveness as a statutory or common-law bond, whatever its form, when voluntarily given for the purpose of procuring the release of an attachment levied upon defendant's effects. (*Id.*)
8. **SUBJECTION OF PROPERTY TO ATTACHMENT—AFFIDAVIT—VALIDITY OF WRIT.**—In an action on the bond given to release the attachment it cannot be questioned whether the property released was subject to attachment or not, nor whether the affidavit for attachment was false or the writ invalid, under which the levy was made. (*Id.*)
9. **BOND FOR RELEASE NOT A STAY BOND—ACCRUAL OF CAUSE OF ACTION—EXECUTION UNSATISFIED.**—A bond given to release an attachment, though in the form of an obligation of defendant to pay the judgment, does not operate as a bond to stay execution on the judgment, nor is an action thereupon an action on the judgment; and the cause of action on the bond accrues as soon as execution against the defendant has been returned unsatisfied, where no stay bond on appeal from the judgment was given to prevent such execution and return. (*Id.*)
10. **ACTION ON BOND—JUDGMENT ON PLEADINGS—MERITS.**—In an action on the bond, a judgment on the pleadings is a judgment on the merits under our code. (*Id.*)
11. **TRIAL—INSUFFICIENT ANSWER—CONCLUSIONS OF LAW—INSUFFICIENT DEFENSE—PROPER JUDGMENT UPON PLEADINGS.**—Where it appeared upon the trial that the denials of the answer were of mere conclusions of law, and that an affirmative defense to the original action on the ground of collusion, which failed to show the facts constituting it, or to show that there was any defense to the original action or any ability to supply upon a new trial evidence alleged to have been suppressed at the former action, states no defense, and where the defendant elected to stand upon the answer, a judgment upon the pleadings was properly rendered. (*Id.*)
12. **INTRODUCTION OF EVIDENCE—SURPLUSAGE.**—The judgment having been rendered upon the pleadings, with a general finding that the averments of the complaint were true, the introduction of evidence at the trial became mere surplusage, and questions of its weight and admissibility are immaterial. (*Id.*)

ATTORNEY AT LAW. See Contempt, 1-3.

BANKS.

1. **CUSTOM AS TO COLLECTION OF PAPER—KNOWLEDGE IMPUTED TO DEPOSITOR—CONTRACT OF AGENCY.**—A reasonable custom of all the banks of a place that none of them shall be liable for commercial paper deposited with any one of them for collection elsewhere, until the proceeds thereof in actual money shall come to their possession, must be conclusively deemed known to the depositor, and to be binding upon him as an implied condition of the contract of agency, without reference to his knowledge or want of knowledge of the custom. (*San Francisco Nat. Bank v. American National Bank of Los Angeles*, 408.)
2. **DRAFT FORWARDED FOR COLLECTION—FAILURE OF COLLECTING BANK—LOSS OF DRAWING BANK.**—Where such a custom existed in the banks of San Francisco and Los Angeles, and a bank of the former city sent a draft to a bank of the latter for collection in Arizona, and the collecting bank in Arizona failed after collection, the loss must fall upon the San Francisco bank, which drew the draft. (*Id.*)

See Checks.

BILL OF EXCEPTIONS. See Appeal, 9, 10.

BILL OF PARTICULARS.

1. **ACCOUNT—PLEADING—PURPOSE OF CODE PROVISION.**—The purpose of the provisions of section 454 of the Code of Civil Procedure, that "it is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand therefor in writing, a copy of the account, or be precluded from giving evidence thereof," is to give the adverse party reasonable notice of the items constituting the claim he is required to meet, so that he may prepare for trial. (*Ames v. Bell*, 1.)
2. **NATURE OF BILL OF PARTICULARS—AMPLIFICATION OF PLEADING—FURTHER ORDER—AMENDMENT.**—The bill of particulars required is in the nature of an amplification of the pleading to which it relates, and it is to be construed as part of it for certain purposes; and when the court or judge orders "a further account when the one delivered is too general, or is defective in any particular," as the section provides, the further or amended account is to be construed as an amended pleading for certain purposes. (*Id.*)
2. **WAIVER OF OBJECTION TO AMENDED BILL—MOTION AT TRIAL—OBJECTION TO EVIDENCE.**—Where, after the furnishing of an amended

BILL OF PARTICULARS (Continued).

bill of particulars by order of court, the defendant made no objection to its items for over five months, and until the very moment of trial, objection thereto was waived, and a motion then made for a further bill of particulars came too late, and was properly denied. The defendant cannot object at the trial to any evidence coming within the general scope of the complaint and the amended bill of particulars. (Id.)

- 4. EFFECT OF AMENDED BILL—PRIOR BILLS SUPERSEDED—NEW ITEMS—WAIVER OF OBJECTION.**—The amended and last bill of particulars ordered by the court superseded former bills, and it may include items of the general account for services not before specifically mentioned in previous bills, and where evidence relating thereto was given without objection, and no motion was made to strike it out as a whole, the evidence as to such items must stand. (Id.)

BOND.

- 1. BOND OF BUILDING CONTRACTOR—VALIDITY AT COMMON LAW—APPEAL—LAW OF THE CASE.**—Where, upon a former appeal, the question was raised whether section 1203 of the Code of Civil Procedure, under which a contractor's bond was given, was constitutional, and it was held that the bond, having been voluntarily given, was valid and enforceable as a common-law bond, said decision is the law of the case upon a second appeal, where the voluntary issue of the bond does not appear to have been in issue. (People's Lumber Co. v. Gillard, 435.)
- 2. PURVIEW OF LAW OF THE CASE.**—The law of the case is not confined, in this state, to that portion of the opinion of the appellate court which can be said to be strictly essential to the disposition made of the case. (Id.)
- 3. CHANGES MADE PURSUANT TO BUILDING CONTRACT—PLEADING—FINDINGS.**—Where, pursuant to the decision made on the former appeal, the complaint was allowed to be amended, to set forth changes made pursuant to the terms of the contract, in an action against the sureties on the contractor's bond, and issues were joined thereupon, a finding that the changes were made pursuant to the contract conforms to the amended complaint. (Id.)
- 4. STATUTE OF LIMITATIONS—AMENDED COMPLAINT.**—The amended complaint setting out the change provided for in the contract did not state a new cause of action, foreign to the case, made in the original complaint, on the contractor's bond, so as to allow a plea of the statute of limitations thereto. (Id.)

See Attachment, 1-10.

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BOUNDARY.

1. **ACTION TO QUIET TITLE TO STRIP OF LAND—SUPPORT OF FINDINGS AND JUDGMENT.**—In an action to quiet the title to a strip of land involving a disputed boundary line between the parties, where the evidence is conflicting in relation thereto, and there is evidence fully sustaining all of the material findings in favor of the plaintiff, which are amply sufficient to support the judgment, the province of the trial court to pass upon the weight of the evidence cannot be interfered with upon appeal. (Manuel v. Flynn, 319.)
2. **TESTIMONY OF PLAINTIFF TO PARTICULAR SURVEY—CROSS-EXAMINATION AS TO OTHER SURVEYS.**—Where plaintiff testified in chief only as to the employment of a particular survey or to establish the boundary line and to his own observation as to the meeting of corners, the court properly disallowed questions asked on cross-examination as to other surveys not referred to in the examination in chief. (Id.)
3. **LATITUDE OF CROSS-EXAMINATION—SCOPE LIMITED BY EXAMINATION IN CHIEF.**—The right of cross-examination should be given considerable latitude or not be restricted where it is apparent that it will accomplish some important purpose, and is not carried beyond the scope of the examination in chief. The discretion of the court should not be abused, or given such elasticity as to permit an adversary party to prove his own case under the guise of cross-examination by propounding questions, neither directly nor collaterally related to the subject matter of the original examination. When cross-examination transcends the limitation and purpose of the testimony in chief, it ceases to be cross-examination. (Id.)
4. **WRITTEN AGREEMENT AS TO LOCATION OF CORNER—ALTERATIONS—BURDEN OF PROOF—IMMATERIALITY.**—Where the plaintiff introduced in evidence a written agreement as to the location of an important corner in which alterations appear, the burden of proof was upon the plaintiff to explain the same, and where one was shown to have been made before signing, and the other to have been made merely to correct a manifest mistake in a figure relating to the location of a tree, the location of which was definitely fixed in the agreement by descriptive reference to other monuments, the alterations were sufficiently explained, and shown to be immaterial. (Id.)
5. **TIME FOR DISPROOF OF EXPLANATION.**—The proper time for an attempt by the defendant to disprove the explanations offered by the plaintiff to show the immateriality of the erasures in the written agreement was when those explanations were made, and when the admissibility of the written agreement was before the court for its determination, and the court's conclusion on that issue is bind-

BOUNDARY (Continued).

ing here, notwithstanding a subsequent attempt of defendant to disprove the explanation, when it cannot be said, as matter of law, that the court's determination was unsupported by the explanations made. (Id.)

6. **EVIDENCE—DECLARATION AGAINST INTEREST.**—A witness for the plaintiff was properly allowed to testify to a conversation with the defendant at the time when plaintiff's fence on the boundary line was intact, in which the defendant stated that he had all the land that belonged to him. The evidence, while not conclusive, was admissible to show a declaration by the defendant against his interest. (Id.)
7. **DOCUMENTARY EVIDENCE—NOTICE TO REMOVE FENCE SERVED BY CONSTABLE—CERTIFICATE NOT PRIMA FACIE EVIDENCE.**—Where plaintiff denied having received any notice to remove his fence, a notice signed by the defendant and certified by the constable to have been served by him upon plaintiff was not admissible, the certificate being no part of the official duty of the constable, and not *prima facie* evidence of the fact of service. (Id.)

CERTIORARI. See Contempt, 4, 5; Justice's Court, 4; Municipal Corporations, 18.

CHECKS.

1. **PAYMENT—CONDITIONAL PAYMENT.**—A check drawn *bona fide* on a bank having funds of the drawer is *prima facie* payment, if accepted as cash; but, in the absence of an agreement, the acceptance of it is merely conditional payment or satisfaction of the debt if and when paid. (R. H. Herron Company v. Mawby, 39.)
2. **PRESENTMENT—IMPLIED UNDERTAKING OF DILIGENCE—LOSS BY WANT OF DILIGENCE—ACTUAL PAYMENT.**—The acceptance of such a check from the drawer implies an undertaking of due diligence in presenting it for payment; and if the drawer sustains loss by want of such diligence the check will be held to operate as actual payment. (Id.)
3. **TIME FOR PRESENTMENT.**—At common law the payee of a check, when drawn on a bank in the same place where it is given and received, has until the following day after its receipt to present it for payment as between himself and the drawer. When drawn on a bank in a different place, the payee has the same time and such additional time as will be required to transmit it to the place of payment by due course of mail. (Id.)
4. **AGENCY FOR PRESENTMENT—EFFECT OF MAILING CHECK TO DRAWER BANK.**—For the purpose of presenting and collecting the check the collecting bank must employ a suitable subagent. The mailing

CHECKS (Continued).

of a check to the drawee bank is not a proper presentment or demand for payment, in the absence of proof of usage or custom among banks to do so. The drawee cannot be deemed a suitable agent in contemplation of law to enforce in behalf of another a claim against itself, and such bank may hold it for any time without incurring the obligation of an acceptance. (Id.)

5. **CONSTRUCTION OF CIVIL CODE—LIMIT OF TIME—REASONABLE DILIGENCE IN PROPER PRESENTMENT.**—Section 3213 of the Civil Code, which merely fixes a limit of ten days after which delay in presentment of a check will exonerate the drawer and indorsers thereof, unless the delay be for one of the reasons expressly provided by statute, still requires reasonable diligence in making the presentment, which must be made by a proper agent prepared to treat with the drawee bank at arm's-length. (Id.)

6. **LOSS OCCURRING AFTER DELAY OF TEN DAYS.**—Where it appears that the loss occurred after a delay of ten days from the receipt of the check by plaintiff without lawful presentment thereof, the loss must fall upon the plaintiff, whatever view of the law may be taken. (Id.)

See Contract, 30-32.

CLAIM AND DELIVERY. See Stare Decisis, 1.

COMMUNITY PROPERTY.

1. **PRESUMPTION OF SEPARATE PROPERTY FROM DEED TO WIFE NOT CONCLUSIVE.**—The presumption arising under the amendment of 1889 to section 164 of the Civil Code, that property conveyed to the wife is her separate property, cannot be deemed conclusive, and may be overcome by proof that the purchase was made with community funds. In such case the property remains the property of the husband, and is liable for the community debts. (Bekins v. Diesterle, 690.)
2. **EARNINGS OF WIFE PART OF COMMUNITY PROPERTY.**—The earnings of the wife are as much part of the community property as are the earnings of the husband. (Id.)
3. **ACTION BY HUSBAND AGAINST DECEASED WIFE'S ADMINISTRATOR—COMMUNITY PROPERTY—EVIDENCE—ADMISSIONS OF HUSBAND—WAIVER OF LETTERS—ERROR.**—In an action by the husband against the administrator of his deceased wife, to establish that real property standing in the deceased's wife name was paid for with community funds, and was community property, where the court found that one lot was held in trust for the community, but that another lot was conveyed by the husband to the wife as a gift, and all the evidence tending to rebut that of plaintiff was in the nature

COMMUNITY PROPERTY (Continued).

of admissions by him against interest, and the oral evidence of such admissions was conflicting, it was prejudicial error to admit a waiver of letters by the husband, and request for defendant's appointment, appended to a petition for letters, stating that such other lot was the property of the deceased at the time of her death, without preliminary proof that the husband had read the petition and knew its contents when he signed the waiver. (*Deming v. Gamble*, 771.)

CONSTITUTIONAL LAW. See *Mechanics' Liens*, 5, 6; *Municipal Corporations*, 10, 12; *Office and Officers*, 2; *Place of Trial*; *Slander*, 2.

CONTEMPT.

1. **HABEAS CORPUS—COMMITMENT OF ATTORNEY FOR CONTEMPT—PRESUMPTION IN FAVOR OF ACCUSED.**—Upon an application for a writ of *habeas corpus* to review the validity of the commitment of an attorney for contempt of the superior court, though the law does not permit the petitioner to contradict the recitals of facts set forth in the order of commitment, yet no presumption or intentions can be indulged in against the petitioner. The offense being criminal in its nature, both the charge and the finding of the court are to be strictly construed in favor of the accused; and the facts set forth in the commitment must be sufficient to show contempt within the meaning of the law, without the aid of intentions and presumptions. (*In re Shortridge*, 371.)
2. **INTERRUPTION OF PROCEEDINGS OF COURT—FACTS NOT STATED.**—The statement that the attorney held for contempt interrupted the proceedings of the court, against the order of the court to cease such interruption, without stating what he said and did, does not comply with the mandate of the law that the facts occurring in the immediate view and presence of the court must be recited in the order. Many interruptions by an attorney may be lawful and proper, and the particular circumstances of the interruption must be set forth, in order that the commitment shall show on its face that the remarks of the attorney were out of the line of his duty as an official of the court, and to the party represented by him. (*Id.*)
3. **SUPPOSABLE FOUNDATION FOR CONTEMPT—CLIENT A FUGITIVE FROM JUSTICE—FACTS NOT SHOWN.**—A defendant in a criminal case who is a fugitive from justice, or who refuses to submit himself to the jurisdiction of the court, has no right to be heard in court by counsel, until he does submit himself to the jurisdiction of the court; and if the commitment had shown what does not appear therein, that the client of the petitioner was at the time of the

CONTEMPT (Continued).

acts complained of a fugitive from justice, and that the court for that reason had refused to permit him to address the court in behalf of his client, and that he nevertheless persisted in so doing, the action of the court in adjudging him guilty of contempt would be sustained. But this rule cannot apply where no such fact or reason is shown in the commitment for denying to the petitioner the right to address the court. (Id.)

4. **CERTIORARI—COMMITMENT FOR CONTEMPT—CRIMINAL OFFENSE—CONSTRUCTION—REVIEW OF JURISDICTIONAL FACTS—PRESUMPTION.**—Contempt of court is a specific criminal offense; and the charge, finding and judgment of the court therein must be strictly construed in favor of the accused. The findings do not conclude a reviewing court from examining the record to determine the jurisdictional facts. Where the performance or taking of necessary steps which ought to appear of record is not shown, it will be presumed that such steps were not taken. (Reymert v. Smith, 380.)
5. **INSUFFICIENT RECORD—CONTEMPT OUT OF PRESENCE OF COURT—NOTICE OR SERVICE NOT SHOWN—WANT OF JURISDICTION.**—Where the alleged contempt was committed out of the presence of the court or judge, no step essential to a proper accusation and plea in a criminal case should be omitted; and where there is nothing in the record to show that the petitioner was served with notice or an order to show cause indicating the charge of contempt, or that he was served with a copy of the affidavits, or given an opportunity to answer, and no answer or plea was filed, the court was without jurisdiction to make the order of commitment for contempt. (Id.)

CONTRACT.

1. **CONTRACT FOR SALE OF GRAPES—"ABOUT 250 TONS MORE OR LESS"—PAROL EVIDENCE—ENTIRE CROP.**—Under a written contract for the sale of "about 250 tons grapes more or less, at the stipulated price of \$27.00 per ton cash after delivery, grapes to be of sound quality," parol or extrinsic evidence is not admissible to show that the sale was intended to include the entire crop of grapes grown in the vineyards of the sellers, including 166 tons additional to the quantity specified. (Peterson v. Chaix, 525.)
2. **IMPLIED AGREEMENT.**—Though there is no express agreement to purchase the grapes, the law implies an agreement by the purchasers to pay at the stipulated price for all grapes received by them of the quality named, and when nearly 257 tons were accepted, the law implies no agreement to accept any grapes in excess thereof. (Id.)
3. **GENERAL RULE AS TO EXTRINSIC EVIDENCE—EXCEPTIONS.**—Though, as a general rule, where a contract appears to be partly in writing

CONTRACT (Continued).

and partly in parol, and is uncertain in its terms, parol evidence is admissible to show what the stipulations were, and in construing an uncertain contract parol evidence is admissible to show the circumstances under which the contract was made, etc., yet neither of these rules applies where the contract, with what the law implies from its terms as a necessary part thereof, is certain, clear, definite, complete and unambiguous, in which case it cannot be added to, varied or contradicted by extrinsic evidence. (Id.)

4. **CONSTRUCTION OF CODE PROVISIONS.**—Section 1860 of the Civil Code, as to parol evidence of the circumstances, etc., is to be restricted in its application, so as to harmonize with section 1625 of that code, making a written contract supersede all oral negotiations, and also with section 1856 of the Code of Civil Procedure, allowing a mistake, imperfection, or invalidity of the contract to be put in issue by the pleadings. (Id.)
5. **TERMS OF CONTRACT NOT INTRODUCING AMBIGUITY**—"ABOUT"—"MORE OR LESS."—It is settled, upon authority, that the terms "about" and "more or less," used in the contract in question, introduce no ambiguity, and that extrinsic evidence of previous or contemporaneous conversations is not admissible to show what was meant by their use when the contract does not refer to independent circumstances to identify the goods sold. (Id.)
6. **ACTION FOR BREACH OF CONTRACT—FAILURE TO DELIVER STEEL FOR BUILDING AS AGREED—DAMAGES—SUPPORT OF VERDICT.**—In an action to recover damages for breach of contract in failing to deliver steel for plaintiff's building, as agreed, where there is sufficient evidence to show that the contract was broken in failing to deliver the steel in the condition and within the time required, and the evidence was conflicting as to the damages arising from the breach, and the verdict for the plaintiff was sufficiently supported by the plaintiffs' witnesses, the verdict cannot be disturbed upon appeal. (Hale Bros. v. Milliken, 344.)
7. **LIMIT OF POWER OF APPELLATE COURT—REVIEW OF EVIDENCE.**—The evidence must be so plainly and palpably insufficient to support the verdict that it can be said that such is the case, as matter of law, before this court is justified in setting aside a verdict upon the evidence or disturbing the findings of the trial court. A verdict finding the facts in a particular way forecloses any inquiry as to the credibility or discredit of witnesses by cross-examination. (Id.)
8. **EVIDENCE—CIRCUMSTANCES ATTENDING CONTRACT—KNOWLEDGE BY DEFENDANT'S AGENT—DAMAGES RESULTING FROM BREACH.**—Evidence was admissible to show all of the circumstances leading up to and attending the execution of the contract which were known to the defendants through their agent acting within the scope of his authority in the execution thereof, including a lease which ex-

CONTRACT (Continued).

plained the necessity for prompt delivery required by the contract; and when such special circumstances were thus known to both parties, the damages resulting from the breach of the contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from its breach under such known circumstances. (Id.)

9. **EVIDENCE OF USAGE INADMISSIBLE—LEGAL STANDARD OF WEIGHTS AND MEASURES.**—Where there is nothing in the contract to show the adoption of any other standard for the measurement of steel furnished under the contract, the legal standard of weights and measures fixed in this state must be deemed to enter into and become part of the contract executed therein, and evidence of local usage in San Francisco among manufacturers of and dealers in structural iron and steel to give a figured or estimated weight according to dimensions, instead of "scale" weight, determining the actual number of pounds therein, is inadmissible to vary the legal effect of the contract. (Id.)
10. **REPETITION OF EVIDENCE.**—Where proposed evidence is already before the jury, no injury could result in disallowing its repetition. (Id.)
11. **REJECTION OF LETTER UNPREJUDICIAL.**—Any error on the rejection of a letter from defendants' agent to plaintiff's agent was without prejudice, when defendants presented to the jury all that could by any possibility have been shown by the rejected letter. (Id.)
12. **LETTER ADMITTED ON CROSS-EXAMINATION—RIGHT OF EXPLANATION.** Where a letter written by a witness was admitted on cross-examination, as tending to show a discrepancy, the witness was properly allowed, on re-examination, to explain the circumstances under which it was written, and the reason for writing it. (Id.)
13. **INSTRUCTIONS.**—*Held*, that in the instructions given, in view of the circumstances of the case developed by the evidence, there was nothing that could have prejudiced the appellants. (Id.)
14. **DELIVERY OF GOODS—ACTION FOR BREACH—BREACH BY PLAINTIFF—REFUSAL TO ACCEPT AND PAY—DEFENDANT EXCUSED.**—In an action for damages for breach of a contract to deliver ten carloads of apples, where the contract required the plaintiff to pay on delivery of each carload, and it appears that plaintiff was guilty of an inexcusable breach of the contract on his part by refusal to accept and pay for the eighth carload, such breach of the contract on plaintiff's part excused further delivery by defendant, and plaintiff cannot recover. (*Wood, Curtis & Co. v. Seurich*, 252.)
15. **MUTUAL BREACHES OF CONTRACT—GENERAL RULES.**—One who refuses or fails to perform the conditions imposed upon him by the terms of a contract, and shows no excuse for such refusal or fail-

CONTRACT (Continued).

ure, cannot recover for a breach of contract by the other party; and the refusal of one party to a contract to make payment as called for by the terms of the contract excuses the other party from further performance. (Id.)

16. NOTICE OF RESCISSION FOR BREACH NOT INVOLVED.—The plaintiff who is guilty of a breach on his own part cannot insist that defendant failed to give notice of rescission of the contract on account of the plaintiff's breach. The defense is not predicated upon a rescission of the contract, but rests upon the rule that the plaintiff, who has broken the contract, cannot recover for the defendant's refusal to perform after such breach. (Id.)
17. BREACH OF CONTRACT TO SEED AND PACK RAISINS—NEGLIGENCE—DAMAGES—QUESTION OF TITLE.—In an action to recover damages for breach of contract by a fruit company to seed and pack a carload of raisins for a firm in a first-class manner, where it appears that they were so negligently seeded and packed that they were spoiled and became worthless, the fruit company became liable to the firm for the damages caused by the violation of the contract, if it does not appear, as claimed by the fruit company, that the firm had parted with the title to the raisins by a sale thereof before suit. (*Giffen v. Selma Fruit Co.*, 50.)
18. SALE OF RAISINS BY SAMPLE—WARRANTY OF QUALITY—REJECTION BY PURCHASER—TITLE NOT PASSED.—Where the carload of raisins in question was sold by sample by the firm before suit, a warranty to the purchaser was implied that the raisins were up to the sample, and where they were rejected by the purchaser upon inspection as not being up to the sample, no title passed thereto from the firm. (Id.)
19. DELIVERY OF BILL OF LADING WITH DRAFT—INTENTION NOT TO PASS TITLE.—Where the raisins sold by sample were billed to the order of the firm, subject to inspection and acceptance by the purchaser, and the bill of lading and an accompanying draft were received by the purchaser and the draft paid, before the raisins arrived, which, upon arrival and inspection, were rejected, after which the draft was repaid by the firm, it is clear that it was intended that the bill of lading should not have the effect to pass the title. (Id.)
20. EVIDENCE—COURSE OF BUSINESS.—Evidence was admissible to show the course of business of the proposed purchaser with the firm to pay all drafts accompanying bills of lading, without reference to the transfer of the goods shipped by the bill of lading, that the drafts were paid and charged to the account of the seller, and the goods, when received and accepted, were credited by the seller. (Id.)
21. CROSS-EXAMINATION—CORRESPONDENCE—BEST EVIDENCE—MOTION TO STRIKE OUT—DISCRETION.—Where, on cross-examination, it appeared

CONTRACT (Continued).

that various letters passed between the parties, it was not an abuse of discretion for the court to refuse to strike out the evidence with regard to the course of business, on the ground that the letters were the best evidence, where no objection was made when the evidence was offered, and it does not clearly appear that all the course of business was by letters, and where defendant made no attempt to have the letters produced. (Id.)

22. **ACTION FOR BREACH OF CONTRACT—PURCHASE OF GRAPES—DIFFERENT KINDS AND PRICES—PLEADING—SHRINKAGE IN WEIGHT—DEMURRER FOR UNCERTAINTY—HARMLESS ERROR.**—In an action to recover damages for breach of a contract to purchase grapes of different kinds and prices, where damage was claimed for rejection of one kind and loss on resale, and also for shrinkage in weight by reason of delay in acceptance of the grapes at maturity, of over forty-five tons, a demurrer for uncertainty in not stating what shrinkage occurred in each kind of grapes at a designated price should have been sustained; but where it appeared in evidence at the trial that the shrinkage was in only one kind of grapes delivered, the error was harmless, and not ground for reversal of a judgment for plaintiff. (Leonhart v. California Wine Assn., 19.)
23. **UNCERTAIN PLEADING LIKE OTHER ERROR AFTER TRIAL.**—The same rule applies to errors in overruling demurrers for uncertainty in pleading, after trial of the issues, that applies to the errors of the court. The error must be not merely abstract, but must be prejudicial and injurious, to avail the appellant, otherwise he has no cause for complaint. (Id.)
24. **TERMS OF CONTRACT AS TO DELIVERY OF GRAPES—INCONSISTENT DEFENSE OF CUSTOM—PAROL EVIDENCE INADMISSIBLE.**—A custom as to the delivery of grapes in small installments, which is inconsistent with the terms of the written contract for their delivery, constitutes no defense to the action for its breach; and the contract being certain in its terms, parol proof of usage is not competent to vary it. (Id.)
25. **JURY TRIAL—REQUEST FOR SPECIAL VERDICT—REFUSAL—ERROR NOT SHOWN—PRESUMPTIONS UPON APPEAL.**—Where, upon the trial of the action by jury, defendant requested a special verdict, which was refused, and the record upon appeal fails to specify upon what issues it was requested, no error is shown in the refusal. Error will not be presumed upon appeal; but all intendments are in favor of the regularity of the action of the trial court. (Id.)
26. **EVIDENCE—DELAY OF OTHER PERSONS IN DELIVERY OF GRAPES.**—Evidence on the part of the plaintiff to show that persons other than the plaintiff were delayed in the delivery of their grapes was admissible, not to show that plaintiff was also delayed, but to

CONTRACT (Continued).

show the congested condition and lack of facilities at the winery of the defendant for accepting grapes. (Id.)

- 27. ACTION FOR SERVICES—PLEADING—PROMISE OF HUSBAND AND WIFE—AMENDMENT—PROMISE OF WIFE—CAUSE OF ACTION NOT CHANGED—STATUTE OF LIMITATIONS.**—In an action for services, where the original complaint alleged a promise by husband and wife to pay for services rendered on mining property owned by the wife, an amendment made more than two years after the promise, omitting the husband as a party and alleging only a promise by the wife, does not show a change of the cause of action against her nor disclose a bar of the statute of limitations, which runs only to the filing of the original complaint, to which the amendment relates. (Calloway v. Oro Mining Co., 191.)
- 28. ORIGINAL SERVICES TO INSOLVENT CORPORATION—NEW EMPLOYMENT BY WIFE—ORIGINAL PROMISE—ASSIGNMENT OF CLAIMS—FINDING—INSUFFICIENT PROOF.**—Where the services of workmen on the mine were originally rendered to a corporation which became insolvent, and which was in possession under an executory contract with the owner, who, to prevent threatened proceedings against the corporation and its stockholders made an original promise that if they would continue to work the mine, she would pay them when she regained possession, their continuance in work became a new employment by her; and an alleged assignment of the claims of the workmen against her to the plaintiff, and a finding thereof is not supported by proof of an assignment of claims by them against the corporation, in the absence of proof of any assignment, oral or otherwise of their claims against the owner. (Id.)
- 29. JURISDICTION OF SUIT—SERVICES OF PLAINTIFF—AMOUNT CLAIMED.** The jurisdiction of the suit, notwithstanding the absence of proof of the alleged assignment, is not determined by the amount of the services of the plaintiff but by the whole amount claimed in the complaint. (Id.)
- 30. ACTION FOR SERVICES OF ARCHITECT—PLEA OF ACCORD AND SATISFACTION—CHECK IN SATISFACTION—EXECUTION NOT DENIED—JUDGMENT ON PLEADINGS.**—In an action to recover for the services of an architect, on a specified contract, where the answer sets up a different contract, and sets up a check paid in full of all demands by way of accord and satisfaction, the execution of which check was not denied, the court did not err in denying the defendant's motion for judgment on the pleadings. The admission of the execution and genuineness of the check did not admit the plea of accord and satisfaction set forth in the answer. (Newsom v. Woollacott, 722.)
- 31. MEMORANDUM ON CHECK—IN FULL FOR FEES—PAROL EVIDENCE—EFFECT OF TERMS.**—Where the check set forth in the answer, the execution of which was not denied, contained the written mem-

CONTRACT (Continued).

orandum, "In full for 9th and Grand Ave. fees," and it appears that the services sued for were for the erection of a hotel on 9th street and Grand avenue in Los Angeles, the plaintiff might, notwithstanding the failure to deny its execution, introduce parol evidence to controvert it by showing mistake, fraud or like defense, or that it had no connection with the contract sued on; but, in the absence of such evidence, the instrument stands as an exponent of the facts therein set out, and must be taken for what it purports on its face to mean. (Id.)

- 82. PRESUMPTIVE KNOWLEDGE—IMPROPER INSTRUCTION.**—The plaintiff, having failed to controvert or explain the check by parol testimony, must be presumed to have had full knowledge of the existence and terms of the memorandum on the check, when delivered to him, and before it passed out of his possession; and it was error to instruct the jury in effect that, notwithstanding they found the check was intended to apply to the demand sued on, they must, nevertheless, in order to render a verdict for the defendant, find the further fact that plaintiff was aware of the memorandum written thereon, when delivered, or that he knew of the writing upon the check before it passed out of his possession. (Id.)

See Corporations, 1-4; Irrigation District, 10-12; Mechanics' Liens; Mortgage, 13; Party-wall; Pleadings, 6-9; Specific Performance.

CORPORATIONS.

- 1. DISPOSITION OF PROPERTY—AUTHORITY OF DIRECTORS—POWER OF PRESIDENT.**—A corporation can only act in relation to the control and disposition of its property through its board of directors, or some one authorized by the board. Its president has no power, merely by virtue of his office, to buy or sell the property of the corporation or to make an executory contract to sell its property binding upon it. (Northwestern Packing Co. v. Whitney, 105.)
- 2. UNAUTHORIZED EXECUTORY CONTRACT OF SALE—CORPORATION NOT ESTOPPED.**—The corporation is not estopped to deny the validity of an unauthorized executory contract of its president to sell its property, to which the corporate seal is not attached, and from which it has derived no benefit and which was not authorized by any course of business between the parties nor ratified by the board of directors. (Id.)
- 3. EVIDENCE—BY-LAWS OF CORPORATION.**—Where a corporation is sought to be charged for breach of an agreement executed by its president which has not been performed, and there is no question of estoppel or ratification, the by-laws of the corporation are admissible in evidence to show that the president was only authorized

CORPORATIONS (Continued).

to execute instruments in writing which have been first approved by the board of directors. (Id.)

4. **BROKER'S COMMISSION NOT ALLOWABLE—PROCURING OF PURCHASERS WHO DO NOT CONTRACT.**—A broker's commission upon the unauthorized contract of sale made by the president of the corporation is not chargeable against the corporation nor is it allowable under the terms of the contract made by the president by reason of the mere finding of purchasers ready, able and willing to purchase, where there was no agreement to purchase and no sale was negotiated. (Id.)
5. **LIABILITY OF DIRECTORS—MISAPPROPRIATION OF MONEY BY PRESIDENT NOT PROVED—NONSUIT.**—The liability of the directors of a corporation for misappropriation of money by the president of the corporation is limited strictly to money proved to have been misappropriated by him; and in an action by the corporation to enforce such liability, where the evidence fails to show that the president misappropriated any moneys belonging to the corporation, a nonsuit was properly granted. (*Hereules Oil Refining Co. v. Hocknell*, 702.)
6. **RIGHTS OF DIRECTORS—ACTION ON QUANTUM MERUIT—FORMER JUDGMENT INVALIDATING NOTES NOT A BAR.**—A judgment in a former action against a corporation based upon notes issued to the directors of the corporation by their own votes, which were adjudged invalid and were canceled, in which the indebtedness of the corporation upon the consideration of the notes was not passed upon or adjudicated, is not a bar to a subsequent cause of action on behalf of the directors, based upon an account stated, and upon a *quantum meruit* for services rendered and for money loaned and money expended by them for the use and benefit of the corporation. (*Shively v. Eureka Tellurium Gold Min. Co.*, 236.)
7. **TIME OF ACCOUNT STATED—IMPLIED AGREEMENT—SUPPORT OF FINDING.**—An account stated by the corporation in favor of one who afterward became its director, for services actually performed and money advanced prior thereto, is valid and binding. No express agreement was required to be shown, but a finding in favor of the account stated is sufficiently based upon an implied agreement. (Id.)
8. **INCURRING OF JUST INDEBTEDNESS BY DE FACTO DIRECTORS.**—The incurring of just indebtedness against the corporation by *de facto* directors, cannot be impeached by showing an irregularity in their election. (Id.)
9. **SERVICES RENDERED AND MONEY ADVANCED BY DIRECTORS—REGULARITY OF ELECTION—SUPPORT OF FINDING.**—If there is any difference in the rule that the directors of a corporation may sue the corporation in *quantum meruit* for money expended and services

CORPORATIONS (Continued).

performed by each in good faith for the use and benefit of the corporation, as applied to *de jure* and *de facto* directors, it is sufficient to declare that a finding that the directors were regularly elected is supported by sufficient evidence to make it binding upon this court. (Id.)

10. **SUFFICIENCY OF EVIDENCE—ABSENCE OF PREJUDICIAL ERROR.—***Held*, that the evidence is sufficient to support all of the findings made in favor of the plaintiff, and the directors, his assignors, and against the defendant corporation and the intervener, upon the claim of fraud and conspiracy of the directors; and that there is no prejudicial error in the rulings of the court. (Id.)

See Estates of Deceased Persons, 10, 11, 14, 15; Municipal Corporations; Receiver, 2-4.

COSTS.

1. **PERCENTAGE IN SAN FRANCISCO.—**In a litigated case in San Francisco, the plaintiff recovering is entitled to the percentage allowed by the statute applicable thereto which is still in force. (*Allsopp v. Joshua Hendy Machine Works*, 228.)
2. **LEGAL PERCENTAGE IN SAN FRANCISCO—STATUTE NOT REPEALED.—**The act of February 9, 1866 (Stats. 1865-66), regulating the recovery of a percentage in litigated cases in the city and county of San Francisco to be included in the judgment against the adverse party, was not repealed by the fee law of 1895, and the percentage allowed by that act is still recoverable. (*Doyle v. Eschen*, 55.)

See Slander.

COURTS. See Justice's Court.

CRIMINAL LAW.

1. **HABEAS CORPUS—NEW INFORMATION—ERROR NOT REVIEWABLE.—**Any error in the exercise of the jurisdiction of the superior court in allowing a new information to be filed, based upon a correction by the magistrate of his order of commitment, without a re-examination, after a first information has been set aside as not warranted by the commitment, or any irregularity in the action of the magistrate, affecting the substantial rights of the defendant, is not reviewable upon *habeas corpus*, and can furnish no ground for his discharge. (*Ex parte Fowler*, 549.)
2. **INFORMATION NOT BASED ON ORDER OF COMMITMENT—SETTING ASIDE.—**An information upon a commitment which held the petitioner for an offense different from that charged in the informa-

CRIMINAL LAW (Continued).

tion has no proper basis on which to rest. The district attorney was not authorized to file it, and it was properly set aside. (Id.)

3. **POWER OF SUPERIOR COURT—NEW INFORMATION—CORRECTION OF IRREGULARITY BY MAGISTRATE.**—The superior court has power, upon setting aside an information because not charging the offense for which the prisoner has been committed, or because of any irregularity in the order of commitment, to order a new information to be filed, or to direct any irregularity in the order of commitment to be rectified by the magistrate, and a new information based thereon to be filed. (Id.)
4. **IRREGULARITY IN COMMITMENT—ASSAULT WITH INTENT TO MURDER—OMISSION OF WORDS—“MALICE AFORETHOUGHT.”**—Where it is clear that the magistrate intended to hold the defendant to answer for an assault with a deadly weapon with intent to commit murder, and the attempt was merely ineffectual for want of the technical words “with malice aforethought,” necessary to the complete description of the crime, it appears that the omission amounts only to an irregularity, which it is within the power of the magistrate to correct, upon being ordered to do so by the superior court. (Id.)
5. **LAPSE OF THIRTY DAYS AFTER EXAMINATION—“GOOD CAUSE” FOR DELAY.**—It seems that section 809 of the Penal Code requiring an information to be filed within thirty days after the order of commitment has no reference to a new information filed, upon a corrected order, after the original has been set aside; but if that section should be deemed applicable the conditions which gave rise to the necessity for the filing of the new information more than thirty days after the original order constitute “good cause” for the delay contemplated by section 1382 of the Penal Code. (Id.)
6. **RE-EXAMINATION NOT REQUIRED UPON CORRECTION OF COMMITMENT.**—Where the magistrate is directed by the court to correct an irregularity in the order of commitment after an information has been set aside, it is unnecessary for the magistrate to go into a re-examination of the charge in order to make the correction which would justify a new information upon the original charge. (Id.)
7. **ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF INFORMATION.**—An information charging an assault with intent to commit rape upon a female child of the age of six years, which states the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what was intended, is sufficient. (*People v. Collins*, 654.)

CRIMINAL LAW (Continued).

8. **ASSAULT UPON FEMALE CHILD—ABSENCE OF CONSENT—RESISTANCE BY LAW.**—An assault with intent to commit rape upon a female child under the age of sixteen years cannot be by consent, as the law resists for her. (Id.)
9. **INTENT TO COMMIT RAPE—CIRCUMSTANTIAL EVIDENCE.**—The intent to commit rape need not be proved by direct evidence. It is a question of fact, and may be proved by inference from the acts and conduct of the defendant, and the circumstances of the case. (Id.)
10. **COMPETENCY OF WITNESS OF TENDER YEARS—DISCRETION.**—The question of the competency of a witness of tender years is one peculiarly within the discretion of the trial court. (Id.)
11. **SWEARING OF WITNESS—OBJECTION UPON APPEAL.**—Where there is nothing in the record to show that the child was not sworn, and the bill of exception states that she was sworn, and no objection was made to the testimony of the child on the ground that she was not sworn, no objection to her testimony on that ground can be raised for the first time upon appeal. (Id.)
12. **EXAMINATION OF CHILD—ADMONITION OF DEFENDANT'S COUNSEL.**—During the examination of the timid child, the court properly admonished the defendant's counsel not to stand within the railing, when the child was thereby disconcerted. (Id.)
13. **HABEAS CORPUS—EMBEZZLEMENT—UNLAWFUL COMMITMENT—STATUTE OF LIMITATIONS.**—A prisoner who is held to answer upon a criminal charge of embezzlement, which is barred by the statute of limitations of three years after the commission of the offense, is unlawfully imprisoned without reasonable or probable cause, and is entitled to be discharged upon a writ of *habeas corpus*. (Ex parte Vice, 153.)
14. **EMBEZZLEMENT BY PASSENGER AGENT OF RAILROAD COMPANY—KNOWLEDGE OF OFFICIALS—DEMAND UNNECESSARY.**—Where the defendant as passenger agent of a railroad company embezzled money for the sale of tickets by appropriating the same to his own use, which was known to the officers of the company when he left its employment, no demand for its return was necessary to constitute the offense. (Id.)
15. **RESIDENCE IN STATE—ASSUMED NAME—RUNNING OF STATUTE.**—Where the defendant resided in this state from the time of the commission of the offense, the fact that he used an assumed name in another part of the state does not constitute any exception to prevent the running of the statute of limitations. He was "an inhabitant of or usually resident within the state," no matter what name he assumed. (Id.)
16. **PRELIMINARY EXAMINATION FOR GRAND LARCENY—JURISDICTION OF JUSTICE OF THE PEACE—TRIAL FOR PETIT LARCENY.**—Where a jus-

CRIMINAL LAW (Continued).

- tice of the peace, acting as a committing magistrate, conducts a preliminary examination upon a charge of grand larceny, he has no jurisdiction in the same proceeding, without the interposition of the formal complaint required by section 1426 of the Penal Code, to order the defendant to appear before him upon a trial for petit larceny. Such action is a mere attempted usurpation of power and is wholly nugatory and void. (*People v. Swain*, 421.)
17. **INDICTMENT FOR GRAND LARCENY—DISMISSAL BY JUSTICE OF THE PEACE NOT A BAR.**—Where, upon the subsequent finding of an indictment for grand larceny, the justice of the peace, upon motion of the district attorney, dismissed the proceeding before him for petit larceny, the defendant cannot plead such dismissal as an acquittal of the lesser offense and a bar to prosecution under the indictment. (*Id.*)
18. **GRAND LARCENY—SUPPORT OF VERDICT.**—Where, upon the trial of a charge of grand larceny, there was legal evidence tending to prove the charge, the verdict of conviction is absolutely final, and cannot be reviewed upon appeal on the sole ground of insufficiency of the evidence to support the verdict. (*People v. Meyers*, 674.)
19. **CHARGE OF MURDER—ISSUE AS TO DEATH FROM ABORTION—ERROR IN INSTRUCTION—CONVICTION OF MANSLAUGHTER—NEW TRIAL.**—Where a defendant charged with murder was tried for the crime of death caused by abortion, and convicted of manslaughter, under an improper instruction on that question, for which error the cause was remanded for a new trial by the supreme court, the conviction for manslaughter, though held erroneous, was an acquittal of the charge of murder, and the new trial must be limited to the charge of manslaughter. (*Huntington v. Superior Court of the City and County of San Francisco*, 288.)
20. **PROHIBITION AGAINST SECOND TRIAL FOR MURDER—LIMITATION OF PENALTY.**—The writ of prohibition will lie to prevent a second trial upon the charge of murder caused by abortion, notwithstanding a proposed limitation of the penalty to manslaughter. (*Id.*)
21. **LIMITATION OF EVIDENCE.**—The charge of manslaughter is not included in the charge of death procured by abortion, and cannot be proved by evidence of that offense. It can only be proved by evidence of facts included in the legal definition of manslaughter. (*Id.*)
22. **MURDER—EXPERT EVIDENCE—HYPOTHETICAL QUESTION.**—In a prosecution for murder, a medical expert testifying for the prosecution may be asked a hypothetical question based upon the evidence for the prosecution. It was not necessary that it should include all of the evidence in the case. (*People v. James*, 437.)

CRIMINAL LAW (Continued).

- 23. WAIVER OF OBJECTION TO HYPOTHETICAL QUESTION—IMPROPER OBJECTION.**—An objection to the form of a hypothetical question as involving a conclusion, which was not urged in the superior court, and which could not prejudice the defendant, is waived and a general objection that the question was a "hypothetical question not warranted by law," raises no issue and amounts to nothing. (Id.)
- 24. INSTRUCTIONS—BURDEN OF PROOF AS TO ELEMENTS OF CRIME.**—An instruction that "each and every fact and circumstance relied upon by the prosecution must be proved by the evidence beyond all reasonable doubt, and if the jury are not satisfied beyond a reasonable doubt that each such fact and circumstance has been proven, it is your duty to find a verdict of not guilty," is not prejudicial to the defendant, and is to be construed with other instructions given wherein the people's duty to prove beyond a reasonable doubt all the elements of the crime charged was clearly set forth. (Id.)
- 25. PRESUMPTION OF INNOCENCE—INSTRUCTION REQUESTED BY DEFENDANT.**—The defendant cannot complain of an instruction requested by himself, "that the presumption of innocence attaches at every stage of the case and to every fact essential to a conviction, and remains with the defendant throughout the trial until the contrary is established beyond a reasonable doubt." (Id.)
- 26. HOMICIDE BY OFFICER—REFUSAL OF INSTRUCTIONS—PRESUMPTION OF OFFICIAL DUTY.**—Where an officer was charged with murder, the court properly refused to instruct the jury "that the law presumes that, if the defendant was an officer and acting as such at the time of the alleged homicide, he was doing his duty," as it conveys the misleading suggestion that if the defendant was an officer he had the right to kill the deceased. (Id.)
- 27. OBTAINING MONEY BY FALSE PRETENSES—PROOF OF ONE FALSE PRETENSE SUFFICIENT.**—In a prosecution for obtaining money under false pretenses, where several pretenses enter into the transaction, proof of one of them constituting an operative cause is sufficient to support the verdict of conviction. Where the false pretenses made to a firm from whom the money was obtained were that a draft for \$5,000 had been mailed to the firm for defendant's credit and that he was employing several men whom the money was needed to pay, it is sufficient to support the verdict that the latter representation was proved, whether the former was sufficiently proved or not. (People v. Ward, 36.)
- 28. PROOF OF FALSE REPRESENTATION AS TO DRAFT—CONDUCT OF DEFENDANT.**—In determining whether the false representation as to the draft was proved, the jury was authorized to consider the acts and conduct of the defendant; and the fact that the defendant never

CRIMINAL LAW (Continued).

called upon the firm after obtaining their money, nor made any inquiry about the \$5,000 draft, and three months after the transaction was found seven hundred miles from the scene thereof, in the absence of explanatory circumstances, is convincing evidence that no draft had been ordered, and that none was expected. (Id.)

- 29. SIMILAR FALSE STATEMENTS—CORROBORATION OF PROSECUTING WITNESS—SCHEME TO COMMIT CRIME.**—Where the defendant denied all the statements of the prosecuting witness, the court properly allowed the testimony of another witness, that on the day of the procurement of the money, and inferentially before it was procured, defendant stated to the witness that he was expecting a draft of \$5,000, and also a shipment of tools for men he was employing, which he wished to store with the witness, but which were not received, as being corroborative of the testimony of the prosecuting witness, and as being material and cogent evidence of a scheme of defendant to commit the subsequent crime. (Id.)
- 30. INDEPENDENT STATEMENTS INCONSISTENT WITH DEFENDANT'S CLAIM—PRELIMINARY PROOF NOT REQUIRED.**—Independent statements of the defendant, which are inconsistent with the defendant's claim and not amounting to a confession, may be proved against him as an admission, without the requirement of preliminary proof. (Id.)
- 31. OBTAINING MONEY UNDER FALSE PRETENSES—SUFFICIENCY OF INFORMATION.**—An information for obtaining money under false pretenses from a person alleged to be its owner, with intent to cheat and defraud him, and with original intent to cheat and defraud another person named, is not defective, because it does not appear that he accomplished his purpose as to such other person, nor because it does not allege the purpose for which the owner paid the money to the defendant. It is sufficient that the information contains every allegation necessary to charge the defendant with the commission of the offense against the owner of the money. (People v. Hines, 122.)
- 32. FALSE PRETENSE OF OWNERSHIP OF RESTAURANT.**—Where, to obtain the money, the defendant falsely represented that he owned a restaurant, and the personal property therein, which he did not own, it is immaterial what other person owned it. (Id.)
- 33. PURPOSE AND MODE OF DEFRAUDING OWNER—QUESTION FOR PROOF.** The question as to how the false pretense was calculated to defraud the owner of the money, whether by a loan of money or by a purported sale, was a matter to be shown by the evidence. (Id.)
- 34. POSSESSION OF RESTAURANT BY DEFENDANT—VALUE IMMATERIAL.**—When the defendant was in charge of the restaurant when the false pretense was made, the court properly excluded evidence of its value

CRIMINAL LAW (Continued).

as being immaterial, the only important question of value being that of the money obtained by the false pretense of ownership. (Id.)

35. **CONFLICT OF EVIDENCE—SUPPORT OF VERDICT.**—Where the evidence is conflicting as to whether the defendant was the owner of the restaurant, and as to whether he was authorized by the owner to sell it, the appellate court will not disturb the verdict of the jury against the defendant or the ruling of the court in denying his motion for a new trial. (Id.)
36. **FORM OF VERDICT—SURPLUSAGE—USE OF SYNONYMOUS TERMS—FORM NOT PREJUDICIAL.**—A general verdict finding "the defendant guilty as charged" is sufficient, and the words appended thereto, "and that the property obtained was of the amount of \$200," might be eliminated as surplusage; yet, where the offense charged was the obtaining of \$200 lawful money of the United States, the word "amount," used with reference thereto, is synonymous with "value"; and the form of the verdict shows no substantial error prejudicial to the rights of the defendants. (Id.)
37. **PASSING FICTITIOUS BILL OF NONEXISTENT BANK—SUFFICIENCY OF INFORMATION.**—An information which charges the defendant with passing a fictitious bill of a bank not in existence with intent to cheat and defraud the complaining witness, and with knowledge of the false and fictitious character of the bill and of the nonexistence of the bank named in the bill at the time he passed the bill, sufficiently sets forth every essential element of the offense for which punishment is provided in section 476 of the Penal Code. (People v. Harben, 29.)
38. **SUFFICIENCY OF EVIDENCE—IMMATERIAL FACTS—ORIGINAL GENUINENESS—INCOMPLETENESS.**—Evidence showing that the bill as passed by defendant was double, and that the two bills as pasted together were in effect a simulation of a current bank note, and were evidently prepared with the purpose of concealing their real character, and as passed were not "genuine," but were "false" bills of a nonexistent bank, and were intended to defraud and deceive the complaining witness, and had that effect, is sufficient to warrant the jury in convicting the defendant. In view of such evidence, it is not material whether the bills may have been originally genuine when they left the bank, nor whether they were originally incomplete and illegally issued. (Id.)
39. **EVIDENCE—SIMILAR CRIMES—KNOWLEDGE OF CHARACTER OF BILL—FRAUDULENT INTENTION—SYSTEMATIC SCHEME.**—Evidence of similar crimes to show knowledge of the character of the bill alleged to have been fraudulently uttered must be confined to prior passage of other fraudulent bills; but on the question of fraudulent intention, and to show a systematic scheme to defraud, similar

CRIMINAL LAW (Continued).

offenses subsequent to the utterance of the bill in question may be proved. (Id.)

40. REMOTENESS OF EVIDENCE—DOCTRINE OF PROBABILITIES—QUESTION FOR COURT.—Conceding that the evidence of similar offenses is based upon the doctrine of chances or probabilities, their remoteness in time and similarity of the instrument become matters affecting the weight rather than the admissibility of the evidence. If the evidence has any application under the rule, whether or not it has sufficient weight to entitle it to be submitted to the jury is a question for the determination of the trial court. (Id.)
41. QUESTION OF ALIBI—PROOF OF SUBSEQUENT OFFENSE—IDENTITY.—If the evidence of another offense tends to establish an intent to defraud, and is admissible for that purpose, it will not be rejected merely because it may also tend to prove the identity of the person who committed the crime being tried; this rule is not affected by the fact that the defense is an alibi. (Id.)
42. CONSTRUCTION OF PENAL CODE—AMENDMENT.—The amendment of section 470 of the Penal Code in 1895 did not affect section 476 thereof, under which the defendant was prosecuted. (Id.)
43. RAPE—CROSS-EXAMINATION OF PROSECUTRIX—COMPLAINT UNDER THREAT OF IMPRISONMENT.—Upon a prosecution for rape by sexual intercourse with a girl under sixteen years of age, it was prejudicial error to refuse to allow the defendant to show upon cross-examination of the prosecutrix, as affecting her credibility, that at the time of making the complaint she was under arrest for vagrancy, and had been threatened with imprisonment if she did not swear to the complaint, and that acting under fear thereof she was induced to swear thereto. (People v. Mitchell, 45.)
44. RAPE—TRIAL—CONTINUANCE—ABSENCE OF MATERIAL WITNESS—INSUFFICIENT ADMISSION BY DISTRICT ATTORNEY.—Upon a prosecution for rape, it was error for the court to refuse to postpone the trial, on motion of the defendant, for the absence of a material witness, who had been duly served with subpoena, but who was too ill to attend, and whose testimony set forth in the affidavit would prove an alibi at the time of the alleged crime, merely because of an admission by the district attorney that the witness would testify to everything that is material in the affidavit without admitting the truth of the facts set forth therein. Such action of the court involves a denial of the constitutional right of the defendant to have the witness orally examined in court. (People v. Fong Chung, 587.)
45. EVIDENCE—VENEREAL DISEASE OF PROSECUTRIX—ABSENCE OF DISEASE OF DEFENDANT.—Upon the trial of the prosecution for rape, it was error for the court to refuse to permit the defendant to prove that at the time of the alleged offense the prosecutrix was

CRIMINAL LAW (Continued).

afflicted with venereal chancroids; that she had had promiscuous intercourse with a great number of other persons before that time, and that the defendant has never in his life had that disease. (Id.)

46. **FAILURE TO MAKE OUTCRY—IMPRISONMENT OF WITNESS.**—It was error for the court to refuse to permit the defendant to prove that the girl made no outcry, and that she was kept under imprisonment, and was allowed to see no one but the sheriff and his deputies, and the district attorney and his deputies and detectives. Such testimony should have been allowed as affecting the credibility of the witness. (Id.)
47. **ERROR IN ALLOWING INSULTING CROSS-EXAMINATION—FACTS IMPLIED WITHOUT PROOF.**—It was error to allow the district attorney to ask indecent, improper and insulting questions on cross-examination of a witness for defendant as to particular wrongful acts, tending to degrade his character, and to create the belief that defendant was in the habit of seducing young girls, without any proof thereof. The fact that the witness denied that the facts involved in the questions were true did not cure the error in allowing questions in violation of sections 2051, 2065 and 2066 of the Code of Civil Procedure. These provisions apply alike to the protection of all witnesses. (Id.)
48. **RAPE—MOTION TO SET ASIDE INFORMATION—LEGALITY OF COMMITMENT.**—Where the only ground of a motion to set aside an information for rape was that the defendant was not legally committed by a magistrate, evidence of a commitment indorsed on the complaint and signed by the committing magistrate, stating that "it appearing to me the offense, to wit, felony rape, in the within complaint mentioned has been committed and there is sufficient cause to believe the within Amadeo Bianchino guilty thereof, I order that he be held to answer the same," etc., shows an order in strict accord with the requirement of section 872 of the Penal Code. (People v. Bianchino, 633.)
49. **VARIANCE NOT URGED—VARIANCE IN DATE UNIMPORTANT.**—Where no ground of variance in the description of the offense was urged upon the motion, it cannot be considered as a ground thereof. But where it appears that only one offense was committed, a mere variance in the date thereof between the complaint and information is unimportant. (Id.)
50. **EVIDENCE—RAPE OF CHILD—RE MOTENESS OF COMPLAINT—INFECTION OF VENEREAL DISEASE.**—Where the rape was committed upon a child five years of age who was incompetent to testify, and the child became infected with a venereal disease as the result of the rape, the complaint of pain by the child, and as to the cause of it, was not too remote under the circumstances. The rule of corroboration does not apply where the child is of too tender an age to testify. (Id.)

CRIMINAL LAW (Continued).

51. **REFUSAL TO ALLOW DEFENDANT'S PHYSICIAN TO EXAMINE CHILD—HARMLESS RULING.**—*Held*, that the refusal of the court to allow defendant's physician to examine the child was harmless in view of the facts. (Id.)
52. **ORDER OF PROOF—CORPUS DELICTI—DISCRETION.**—The order of proof is largely within the discretion of the court. The *corpus delicti* should ordinarily be shown first; but unless it clearly appears that defendant was prejudiced by a ruling permitting other evidence before the *corpus delicti* was established, such ruling will not justify a reversal. (Id.)
53. **ROBBERY—EVIDENCE—DECLARATION OF CONSPIRATORS—CIRCUMSTANTIAL EVIDENCE OF CONSPIRACY.**—Upon a trial for robbery, where the prosecution sought to prove a conspiracy to commit the crime, so as to justify evidence of the declaration of a co-conspirator that the prosecuting witness had "lots of money," the conspiracy need not be established by direct evidence of the common design, but may be shown by circumstantial evidence sufficient to establish a *prima facie* case of an agreement to commit the crime. (*People v. Stokes*, 205.)
54. **ORDER OF PROOF OF DECLARATION AND CONSPIRACY—DISCRETION OF COURT—CODE PROVISION NOT MANDATORY.**—The order in which the proof of the declaration of the co-conspirator and of the existence of the conspiracy may be admitted rests largely in the discretion of the trial court, which may permit the declaration to be first proved, under a proposal of the prosecution to supply proof of the conspiracy to rob. The provision of subdivision 6 of section 1870 of the Code of Civil Procedure allowing proof of the act or declaration of a conspirator, after proof of the conspiracy, is not mandatory. (Id.)
55. **EVIDENCE TENDING TO SHOW CONSPIRACY—QUESTION FOR JURY—INSTRUCTION—CONCLUSIVENESS OF VERDICT.**—Where all the evidence bearing upon the question of the alleged conspiracy tends to prove it, its existence is a question of fact for the determination of the jury; and where, under proper instructions as to the effect of reasonable doubt on that question, the jury found that the agreement of the conspirators to rob was made, its verdict is conclusive of that fact. (Id.)
56. **DUAL FUNCTION OF EVIDENCE OF CONSPIRACY—GUILT OF DEFENDANT.**—The evidence of the independent facts and circumstances which show the conspiracy to rob may at the same time supply evidence tending to prove the guilt of the defendant on trial; but the fact that it performs such dual function is no reason for excluding it. (Id.)
57. **EXISTENCE OF MONEY ROBBED—KNOWLEDGE BY ONE CONSPIRATOR IMPUTABLE TO ALL.**—The existence of the conspiracy to rob the

CRIMINAL LAW (Continued).

prosecuting witness being proved, the knowledge of one of the conspirators, however acquired, that he had a large sum of money, if acquired at any time before the consummation of the crime, was imputable to all of the conspirators, including the defendant on trial. (Id.)

- 58. IMPEACHING EVIDENCE—FOUNDATION NOT LAID.**—Witnesses for the prosecution cannot be impeached by their evidence given on a former trial where no foundation was laid for such impeachment as required in section 2052 of the Code of Civil Procedure. (Id.)
- 59. ADMISSION BY DEFENDANT NOT AMOUNTING TO CONFESSION—PRELIMINARY PROOF NOT REQUIRED.**—An admission made by the defendant in conversation with the sheriff while in custody, not involving a confession of the crime, which was negated by him, but tending in connection with other facts proved to show his guilt, was admissible in evidence against him, without any preliminary proof that the admission was voluntarily made. (Id.)
- 60. ERROR NOT AFFECTING SUBSTANTIAL RIGHTS.**—Any error in the admission of evidence or in any ruling of the court, not appearing to affect the substantial rights of the defendant, must be disregarded. (Id.)
- 61. DELAY IN PASSING SENTENCE—POSTPONEMENT—JURISDICTION NOT LOST.**—The delay in passing sentence upon the defendant at the time fixed therefor, and the postponement thereof for thirty-five days, shows no loss of the jurisdiction of the court to pronounce sentence. (Id.)
- 62. JUDGMENT OF SENTENCE NO PART OF TRIAL.**—Pronouncing judgment, which is the formal declaration of sentence, is not the trial, nor any part thereof, within the meaning of section 13, article I of the constitution. (Id.)
- 63. END OF TRIAL—VERDICT.**—The trial ended with the announcement of the verdict of the jury upon the issue of fact submitted to it for its decision. (Id.)
- 64. ROBBERY—SUPPORT OF VERDICT—CONFLICTING EVIDENCE—FORCE AND FEAR.**—Upon a prosecution for robbery, where the evidence is conflicting as to the identity of the defendant, the jury are the sole judges of the credibility of the witnesses and the weight of the conflicting evidence; and where the complainant's description of the occurrence up to the time of the delivery of her purse to her assailant shows that it was delivered through force and fear, the taking involved the crime of larceny, but embodies every element of the crime of robbery. (People v. White, 329.)
- 65. MOTIVE—ROBBERY AND RAPE—INSTRUCTION—PRESUMPTION.**—Where the evidence indicates a motive and intent to commit both robbery and rape, and the court instructed the jury that if the assault was

CRIMINAL LAW (Continued).

for the purpose of rape, and if there was no intent to rob, and no taking of the purse by force or fear, the defendant should be acquitted, it must be presumed that the jury did its duty in heeding the instruction. (Id.)

66. **QUESTIONS OF FACT—CONCLUSIVE DETERMINATION.**—The credibility of the complaining witness and the preponderance of the evidence, and also what intent and motive were established by the evidence were questions of fact, which were conclusively determined by the superior court in denying the motion for a new trial, and cannot be considered by the appellate court. (Id.)
67. **INSTRUCTIONS NOT CONFLICTING AS TO INTENT AND MOTIVE.**—The instruction dealing with the hypothesis of intent to commit rape without intent to rob did not conflict with another instruction dealing with the hypothesis of robbery, notwithstanding an assault may have been made for some other purpose or motive. (Id.)
68. **INAPPLICABLE REQUESTS.**—Instructions given to the jury must always be adapted to the evidence and circumstances of the case on trial, and requests for instructions by the defendant which were inapplicable thereto were properly refused. (Id.)
69. **IMPROPER REMARK BY DISTRICT ATTORNEY—STATEMENT OUTSIDE OF RECORD—QUESTION NOT PRESENTED TO TRIAL COURT.**—An improper remark by the district attorney as to matter outside of the record is not ground of reversal, where the attention of the court was not called to the matter at the time, and no opportunity was given to the trial court to correct the abuse, where the effect of the remark could have been removed by an instruction to the jury to disregard it. (Id.)
70. **FAILURE TO REQUEST INSTRUCTIONS.**—The failure of the court to instruct the jury upon any proposition deemed essential by the defendant is not to be regarded as error unless the defendant made a request for said instruction. (Id.)
71. **CRIMINAL PROPOSAL BY DEFENDANT TO PROSECUTION—WRITTEN STATEMENT—RIGHT OF CROSS-EXAMINATION NOT INVADED.**—The fact that the prosecutrix was allowed to give a written rather than an oral statement of a criminal proposal made to her by the defendant at the time of the assault was not an invasion of the right of cross-examination. (Id.)
72. **DOUBLE VIEW OF PREMISES—ABSENCE OF JUDGE—WAIVER OF OBJECTION.**—The absence of the judge from a first view by the jury of the premises where the alleged robbery was committed was erroneous, but where the jury was properly instructed and there was no timely objection to his absence, and where the judge fully instructed the jury to disregard all impressions received upon the first view, and another view was taken in the presence of the judge

CRIMINAL LAW (Continued).

- without objection, there was no ground for granting a new trial by reason of the absence of the judge during the first view. (Id.)
73. **INDICTMENT—VALIDITY—DISQUALIFICATION OF GRAND JURORS.**—The validity of an indictment is not affected by the fact that one of its members was qualified because he had served in and been discharged as a juror in the superior court within one year, nor by the fact that two others were disqualified because they were not assessed upon the last assessment-roll of the county. (*Kitts v. Superior Court of Nevada County*, 462.)
74. **CONSTRUCTION OF PENAL CODE—DISQUALIFICATION OF GRAND JURORS —GROUNDS OF MOTION TO SET ASIDE INDICTMENT.**—The disqualifications of individual grand jurors are those prescribed in section 896 of the Penal Code, and do not include the disqualifications of jurors generally urged in this case, and prescribed in the Code of Civil Procedure; and under the maxim "*Expressio unius est exclusio alterius*," it seems the conclusion is warranted that a motion to set aside an indictment under section 995 of the Penal Code for disqualification of individual grand jurors is limited to the grounds specified in section 896 of that code. (Id.)
75. **NATURE OF GRAND JURY—DE JURE BODY—DISQUALIFIED GRAND JURORS ACTING UNDER COLOR OF RIGHT—PROCEEDINGS NOT VITIATED.** The grand jury is a *de jure* body created by the constitution; and one who, having been regularly summoned and impaneled as a grand juror, and who exercises the duties thereof, though thereafter discovered to be disqualified by some provision of law, serves under color of right; and "upon principles of policy and justice," his acts in such capacity should not be held to invalidate the whole jury or any proceedings had by it in which he participated. (Id.)
76. **REGULAR NUMBER IMPANELED—SOLE OBJECTION TO NUMBER.**—If the requisite number of grand jurors have been regularly summoned and impaneled in the first instance, no objection to number can thereafter be urged to question the validity of an indictment, except where it may appear that twelve of such jurors have not concurred in finding it. (Id.)
77. **PROHIBITION—VALIDITY OF INDICTMENT.**—Whatever ground of criticism may be urged against an indictment under a general or special demurrer, where it attempts to set forth a public offense, its validity cannot be questioned under a petition for prohibition addressed to the jurisdiction of the court. (Id.)
78. **STATE REFORM SCHOOL—IMPROPER COMMITMENT OF ADULT—HABEAS CORPUS.**—Only minors between the ages of eight and eighteen, when found to be incorrigible, can be committed to the Whittier State Reform School. Where an adult female has been committed thereto, as being incorrigible, she must be discharged upon writ of *habeas corpus*. (*Ex parte Wood*, 471.)

See Habeas Corpus.

DAMAGES. See Contract, 6, 17; Eminent Domain, 11; False Imprisonment, 1, 5, 6, 8, 12, 13; Negligence, 4, 11.

DEED.

CONDITIONS—WAIVER OF FORFEITURE—GRANTS WITHOUT RESTRICTION.

A forfeiture provided for in a deed upon breach of conditions or restrictions against the carrying on of specified business thereon is waived by grants of adjoining portions of the tract by the same grantor, containing no conditions or restrictions. (*Brown v. Wrightman*, 391.)

See Community Property, 1, 3; Ejectment, 2, 3.

DIVORCE.

1. **ADULTERY—EVIDENCE—GOOD CHARACTER OF DEFENDANT.**—In action for divorce on the ground of adultery of the defendant, the character of the defendant is not in issue, and the court properly refused to admit evidence of her good character, where her good character as a witness had not been impeached. (*Van Horn v. Van Horn*, 719.)
2. **GOOD CHARACTER OF CORRESPONDENT.**—The correspondent named with whom the adultery was charged is not a party to the action, and where he had not been impeached as a witness, evidence of the excellence of his character was properly rejected. (*Id.*)
3. **CUSTODY OF MINORS—DISCRETION.**—Where the only minor was a boy fifteen years of age, and the defendant was adjudged guilty of adultery, the court had discretion to award the custody of the boy to his father. Such custody is always a matter within the discretion of the trial court; the contention that the excluded evidence of good character should have been received on that question has but little merit. (*Id.*)
4. **RULING OF TRIAL COURT REJECTING EVIDENCE—OBJECTION IMMATERIAL.**—The ruling of the trial court in rejecting evidence will be upheld on appeal, if correct, whether the ground on which it was based was stated in the objection as to the evidence or not. (*Id.*)
5. **INTERLOCUTORY JUDGMENT—DISPOSITION OF HOMESTEAD ON SEPARATE PROPERTY—JURISDICTION.**—Where the complaint by the husband for divorce alleged the selection of a homestead on the separate property of the husband therein described, the court had jurisdiction, and it was its duty, under section 131 of Civil Code, at the time of the hearing and granting of the interlocutory judgment that plaintiff is entitled to a divorce, to hear and determine the issue tendered as to the title to the homestead property, and to include in the interlocutory judgment an assignment of the homestead to the husband, as its former owner, in pursuance of sec-

DIVORCE (Continued).

tions 146 and 147 of the Civil Code. (*John v. Superior Court of Los Angeles County*, 262.)

6. **RIGHT TO FINAL JUDGMENT—DEATH OF PLAINTIFF PENDING MOTIONS.**—Where, after the lapse of the year without appeal, the plaintiff properly moved for a final judgment, the death of the plaintiff pending the disposition of the motion and of counter-motions of the defendant relating to the question of property rights did not impair the power of the court to render final judgment for the plaintiff, under the express provisions of section 132 of the Civil Code and of section 669 of the Code of Civil Procedure. (*Id.*)

See Husband and Wife, 1.

DRAINAGE DISTRICT. See Eminent Domain.**EJECTMENT.**

1. **UNPATENTED MINING CLAIMS—ISSUES—PLEADING—FINDINGS—ATTACK UPON PLAINTIFF'S DERAIGNMENT—FORFEITURE—RELOCATION.**—In an action of ejectment for unpatented lode mining claims, where the complaint tendered the usual issues as to ownership, right of possession and ouster, the defendants, upon issues joined thereupon, were entitled to make any proof which would defeat the plaintiffs' title, and may introduce testimony assailing plaintiffs' deraignment of title, without pleading it, and showing a forfeiture by failure of plaintiffs to do annual assessment work for three years, and a valid location and holding by one of the defendants as a qualified locator without specially pleading it; and findings against plaintiffs' deraignment of title, and establishing plaintiffs' forfeiture of title, and the validity of defendants' relocation and holding upon sufficient evidence cannot be assailed. (*Holmes v. Salamanca Gold Min. etc. Co.*, 659.)
2. **DEED FRAUDULENTLY OBTAINED.**—A deed to the plaintiffs, which was obtained by plaintiffs fraudulently and wrongfully and surreptitiously, without the knowledge, consent, or acquiescence of the grantor, is no more effectual to pass title to them than if it were a total forgery, there being no principle of equitable estoppel applicable to the facts. (*Id.*)
3. **UNDELIVERED DEED FROM CORPORATION TO PLAINTIFFS.**—A deed from a corporation to the plaintiffs which was never delivered passed no title to them. (*Id.*)
4. **RELOCATION BY ONE DEFENDANT—PLAINTIFFS' AVERMENT OF POSSESSION BY ALL DEFENDANTS.**—Where the formal relocation was made by one of the defendants, but the plaintiffs have made all defendants parties, and aver possession by all of the defendants, a finding as to that effect is supported. (*Id.*)

EJECTMENT (Continued).

- 5. CORPORATE EXISTENCE OF DEFENDANT.**—Where the plaintiffs alleged the corporate existence of the corporation defendant, no proof of its corporate character is required. (Id.)

EMBEZZLEMENT. See Criminal Law, 18-15.

EMINENT DOMAIN.

- 1. ACTION TO CONDEMN LAND FOR DRAINAGE DISTRICT—SECOND APPEAL—LAW OF CASE.**—In an action to condemn a strip of land for the use of a drainage district, where the sufficiency of the complaint and the question as to the constitutionality of the act under which the drainage district was organized were determined upon a former appeal, such determination is the law of the case, and those questions will not be considered upon a second appeal. (*Laguna Drainage Dist. v. Charles Martin Company*, 166.)
- 2. FORMER JUDGMENT IN PRIOR ACTION FOR SAME CAUSE—STIPULATED JUDGMENT AS TO DIFFERENT LAND NOT A BAR.**—A former judgment in a prior action for the same cause against the defendants' predecessor, which was rendered by stipulation, for a pipe-line over different land, is only conclusive as to the land occupied by the pipe-line, and is not a bar to another action to condemn the strip claimed but not adjudicated in the prior action. (Id.)
- 3. EFFECT OF STIPULATED JUDGMENT—WITHDRAWN CLAIM NOT ABANDONED.**—By the stipulated judgment for an easement upon different land, the claim for the land described in the complaint was in effect withdrawn, and the judgment can have no greater effect than if the complaint had asked for an easement to lay the pipe-line over the precise location described in the judgment. It did not have the effect to show that the plaintiff agreed to abandon forever its right to condemn the land in controversy. (Id.)
- 4. DRAINAGE DITCH A PUBLIC USE—NECESSITY FOR DRAINAGE—DETERMINATION OF BOARD CONCLUSIVE.**—The legislature having declared that a ditch or aqueduct for draining and reclaiming lands is a public use, the determination by the board of trustees of the drainage district as to the necessity for draining the district is final, and not subject to review by the courts. (Id.)
- 5. PROOF OF NECESSITY FOR TAKING LAND OF DEFENDANT—SUPPORT OF VERDICT.**—While the drainage district is required to show by proof that the taking of the strip of land claimed from the defendant was necessary for such drainage, it is held that the evidence as to such necessity is sufficient to support the verdict for the plaintiff. (Id.)
- 6. DAMAGE TO LAND NOT TAKEN.**—*Held*, that the question of damages to the parcel of land not sought to be condemned was fairly sub-

EMINENT DOMAIN (Continued).

mitted to the jury on the evidence, and that its finding as to the amount of damage to such land is a fair deduction from the evidence. (Id.)

7. **CONDEMNATION OF WATER RIGHTS—INSUFFICIENT COMPLAINT—SPECIFIED TOWNS AND “OTHER PLACES” IN COUNTY.**—A complaint by a water company in an action of eminent domain, against the owners of riparian rights to condemn the same to public use for the purpose of supplying two specified towns “and of other places in said county” with water, the term “other places” is too indefinite to embrace either the whole county, or any particular body of inhabitants thereof, nor can those words be regarded as surplusage; but the complaint must be held insufficient as seeking the aid of the statute for an unauthorized purpose, and as being indefinite and uncertain as to the uses for which the condemnation was sought. (*Hercules Water Co. v. Fernandez*, 726.)
8. **BLENDED OF LAWFUL AND UNLAWFUL PURPOSES.**—Where the proceeding shows upon its face two distinct uses or purposes, one lawful and the other not, which are so inseparably blended in the petition and orders as not to be severable, it cannot be sustained; and an application to condemn property for purposes, part of which are within and part not within the act, will be bad *in toto*. (Id.)
9. **TERMS OF STATUTE—EXTENT OF USE.**—The statute, besides allowing water to be condemned for public use in towns, villages, and incorporated cities, allows it to be condemned in behalf of canals, ditches, etc., for “conducting or storing water for the use of the inhabitants of any county,” not for the inhabitants of places in any county indefinitely described, or for the inhabitants of less than those of the entire county. All may not enjoy the use, but the use must be capable of enjoyment by all. (Id.)
10. **COMPLAINT—PUBLIC USE—FINDING.**—A complaint seeking to condemn water rights for public use must state facts showing that the use is one of those enumerated in the statute. A mere general averment that the use for which the property is sought to be taken is a public use is insufficient; and the trial court cannot obviate the requirement of pleading by a finding that the use is a public use. (Id.)
11. **MEASURE OF DAMAGES—DEPRECIATION IN VALUE OF PROPERTY.**—The measure of damages for the taking of the rights of a riparian owner for a public use is the difference in what the property was worth immediately before the appropriation, and what it was worth affected by the appropriation. The single fact to be determined is the depreciation in the value of the property affected by the taking away from it the water sought to be condemned, to be ascertained by competent and proper evidence. (Id.)

EQUITY. See Husband and Wife, 1; Injunction; Judgment, 7; Receiver; Specific Performance.

ESTATES OF DECEASED PERSONS.

1. **SALE OF REAL ESTATE—FAILURE OF PURCHASER TO COMPLY WITH TERMS—RESALE—DISCRETION.**—If, after the confirmation of a sale of the real estate of a deceased person, the purchaser who had made a small cash payment neglected and refused to comply with the terms of sale, the only reason offered being that, owing to the condition of the money market, he was not able to raise the balance of the purchase money, the court had discretion, upon application of the executors, to set aside the sale and order a resale of the property and the exercise of its discretion will not be disturbed upon appeal. (Estate of Long, 684.)
2. **JUDGMENT AGAINST ADMINISTRATORS—ALLOWED CLAIM—STATUTE OF LIMITATIONS.**—Under section 1504 of the Code of Civil Procedure, a final judgment recovered against administrators has only the affect of an allowed claim, which must be directed to be paid in the course of administration, and no statute of limitations can run against the judgment, though more than five years have elapsed from the date when it became final, while the administration still continues. (Shively v. Harris, 513.)
3. **UNTENABLE ACTION BY ADMINISTRATORS.**—An action cannot be sustained by the administrators to have it declared that a judgment against the estate is barred by the statute and is not a claim against the estate. (Id.)
4. **COMPLAINT ON JUDGMENT—ABSENCE OF SUMMONS—ABANDONMENT—ELECTION OF REMEDY—CREDITOR NOT ESTOPPED.**—The mere filing of a complaint upon such judgment against the administrators just before the expiration of five years from the date of its finality is not the pursuit of any remedy, and the principle of election of remedy does not apply to estop the plaintiff from claiming under the judgment as an allowed claim, where he took no further step in the action, and issued no summons therein, but practically abandoned it. (Id.)
5. **INVALID TRUST UNDER WILL—SUSPENSION OF POWER OF ALIENATION—TITLE OF HEIRS.**—A trust under the will of a deceased person providing for an absolute continuance thereof for the period of twenty-five years may by possibility suspend the power of alienation beyond lives in being, and is invalid and void under sections 715 and 716 of the Civil Code; and the title became vested in the heirs of the deceased testator. (Estate of Fay, 188.)
6. **DISTRIBUTION—CONVEYANCE BY WIDOW TO SON.**—Where the deceased left surviving him his wife and two sons, and the widow, during administration, conveyed all of her interest in the estate to

ESTATES OF DECEASED PERSONS (Continued).

one of the sons, her interest in the estate vested in him, regardless of whether the property was community property or separate property, and the estate was properly distributed to the two sons, according to their respective interests in the estate. (Id.)

7. **PROBATE OF WILL—INSUFFICIENT OBJECTIONS.**—Objections to the probate of a will, that the testator had, after the date thereof, executed a general power of attorney to his wife, and believed that the will had been revoked; that certain provisions and directions therein contained were invalid; and that the will was not the will of the testator, without the statement of facts to justify such conclusion—were insufficient, and a general demurrer thereto was properly sustained. (Estate of Kilborn, 161.)
8. **EFFECT OF POWER OF ATTORNEY—WILL NOT REVOKED.**—The general power of attorney to the wife of the testator ceased to be operative upon the death of the testator; and its execution could in no sense be given effect as a revocation of the prior duly executed will. (Id.)
9. **SCOPE OF HEARING ON PROBATE—DUE EXECUTION—VALIDITY OF PROVISIONS.**—The court, upon the hearing of a petition for the probate of a will, is called upon merely to determine the validity of its execution. The sufficiency or invalidity of its provisions cannot then be determined, but will be determined when effect is sought to be given to them. (Id.)
10. **ORDER GRANTING LETTERS TO QUALIFIED CORPORATION—BOND NOT REQUIRED.**—An order granting letters testamentary to a corporation named as coexecutor, and qualified to act as such under its articles of incorporation, and having a paid-up capital stock of \$250,000, without requiring any bond therefrom, was justified, under the provisions of the act of April 6, 1891 (Stats. 1891, p. 490), where no objection was raised as to the solvency or financial responsibility of such corporation. (Id.)
11. **STATUTE NOT SPECIAL LEGISLATION.**—The fact that a special undertaking is required from individuals, and not from a corporation having the required capital, does not render the act of 1891 invalid as special legislation. The manner of affording ample security to those interested in the estate, before appointment, is the subject of general law; and the kind, character and extent of the security is matter for the legislature to determine. (Id.)
12. **POWER OF COURT TO PROVIDE AMPLE SECURITY.**—Where the security is for any reason insufficient, the court has general power to provide further security, if satisfied that the interests of the estate demand it; and this power extends, in such case, to requiring additional security from a testamentary corporation, in addition to the security arising from its paid-up capital. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

13. **CLAIMS—SUFFICIENCY OF AFFIDAVIT ON BEHALF OF CLAIMANT.**—An affidavit to a claim against the estate of a deceased person, made by some other person, acting on behalf of the claimant, must state the reason why it is not made by the claimant; and if it fails to do so, it is insufficient. (*Maier Packing Co. v. Frey*, 80.)
14. **AFFIDAVIT BY OFFICIAL ON BEHALF OF CORPORATION.**—An affidavit to a claim on behalf of a corporation must state that it is a corporation, and the averment of that fact shows a sufficient reason why it is not made by the corporation. Where that fact is not stated, the claimant cannot be assumed to be a corporation; but if it is stated, the affidavit by an official should show that the person acting in its behalf is an officer of the corporation presumed from his official position to have sufficient knowledge of its affairs. (*Id.*)
15. **AFFIDAVIT FOR CORPORATION BY OTHER PERSON.**—An affidavit on behalf of a corporation by other than such official must contain averments tending to show, when he swears that there are no offsets to his knowledge, that the nature of his relation to the company is of a character calculated to place him in possession of requisite information on that subject. (*Id.*)
16. **AFFIDAVIT BY OR ON BEHALF OF INDIVIDUAL.**—When the affidavit is made by an individual who bases his claim upon transactions with the deceased, the law imputes to him knowledge of the truth of the averments made therein. When made by another on his behalf, the affidavit must, in addition to averring that he has no knowledge of any offsets, aver facts showing that he was in a position to know of them if any existed. (*Id.*)

See Account, 1; Community Property, 8; Statutes of Limitations, 7, 9.

ESTOPPEL. See Agency, 9; Corporations, 2; Estates of Deceased Persons, 4; Irrigation District, 10; Judgment, 5, 6; Mortgages, 12; Quieting Title, 1.

EVIDENCE.

ACTION TO QUIET TITLE—UNITED STATES PATENT—RECORD OF CERTIFIED COPY—RECORDER'S COPY.—In an action to quiet title, where plaintiff derails title under a patent from the United States, a copy of which, certified by the commissioner of the general land office, was recorded in the proper county, the record of such copy has, under section 1160 of the Civil Code, *prima facie*, the same force and effect as the original for title or for evidence "until the original letters patent be recorded," and under section 1833 of the

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EVIDENCE (Continued).

Code of Civil Procedure, the copy of such record certified by the recording officer is *prima facie* evidence. (*Preston v. Hirsch*, 485.)

See Account; Bill of Particulars, 3; Boundary, 1-7; Contract, 1, 3-5, 7-12, 20, 21, 24, 26, 31; Corporations, 3; Criminal Law, 9-12, 18, 21, 22, 23, 29, 30, 35, 38-41, 43-47, 50-60, 64-66; Divorce, 1-4; Fraud, 1, 3; Lease, 2, 11, 14; Mortgage, 13; Negligence, 1, 2, 4, 8, 17, 24; Nonsuit; Partnership, 2, 4, 5; Party-wall, 8; Specific Performance, 1, 2, 5, 8, 9; Trust.

EXECUTION.

1. **PROCEEDINGS SUPPLEMENTARY TO EXECUTION—RIGHTS OF THIRD PARTIES.**—Upon a proceeding supplementary to execution the judgment creditor is not entitled to an order that a third person, who has received money from the judgment creditor, which is claimed in good faith to be the property of such third person, shall pay the same to the sheriff to be applied by him toward the satisfaction of the judgment. The title of such third person cannot be litigated in such proceeding. (*Union Collection Co. v. Snell*, 130.)
2. **Modes of Litigating Title of Third Person—Power of Court—Creditor's Bill.**—The only power of the court in the supplementary proceeding is to authorize the judgment creditor to institute an action against such third person to recover the money and to forbid a transfer of it until such action shall be prosecuted to judgment. But the judgment creditor may also litigate the question by a creditor's bill against such third person as claiming under the judgment debtor. Such creditor's bill is not superseded by proceedings supplementary to execution. (*Id.*)

EXECUTORS AND ADMINISTRATORS. See *Estates of Deceased Persons.*

FALSE IMPRISONMENT.

1. **Action for False Imprisonment—Arrest in Civil Action—Insufficient Affidavit—Order Without Jurisdiction.**—An action will lie to recover damages for false imprisonment under an order of arrest in a civil action where the affidavit upon which the order of arrest was based is insufficient on its face to give the superior court jurisdiction to issue the order. (*Neves v. Costa*, 111.)
2. **Essentials of Affidavit—Competent Evidence—Finding Upon Trial—Hearsay.**—To justify an order of arrest under section 481 of the Code of Civil Procedure, competent evidence must appear by affidavit of the plaintiff, or some other person, such as to justify the court in making a finding upon a trial that the case is one mentioned in section 479 of that code. If plaintiff does not

FALSE IMPRISONMENT (Continued).

- personally know the facts, he must procure the affidavit of one who does personally know them. The order of arrest cannot be based upon hearsay, nor upon any statement, however positive, which is founded upon hearsay. (Id.)
3. **"FALSE IMPRISONMENT" DISTINGUISHED FROM "MALICIOUS PROSECUTION."**—The actions of "false imprisonment" and "malicious prosecution" are quite distinct. The element of malice in the former, which is essential in the latter, can only be considered where exemplary damages are asked in the former, and then only as affecting the measure of damages; and "the want of probable cause," which is essential in the latter, is immaterial in the former; while the necessity of awaiting the termination of the action in the latter is not required in the former. (Id.)
4. **SUFFICIENCY OF COMPLAINT—WAIVER OF UNCERTAINTY—ABSENCE OF PROBABLE CAUSE—SURPLUSAGE.**—Where the complaint for false imprisonment was sufficient upon general demurrer and no special demurrer was interposed for uncertainty, all mere uncertainty is waived. Averments that the defendant acted "unlawfully and without probable cause," if unnecessary, may be treated as surplusage and meaningless. (Id.)
5. **IMPRISONMENT AFTER SURRENDER BY BAIL—VARIANCE NOT SHOWN.** The fact that the imprisonment of the plaintiff did not immediately follow the arrest makes it none the less the result of the arrest by the defendant's procurement; and the fact that he was admitted to bail, and that the bail surrendered him into custody, without his procurement, only goes to the amount of the damages suffered, and does not show a variance as to the cause of the imprisonment. (Id.)
6. **EVIDENCE—RELEASE FROM IMPRISONMENT—TIME LOST FROM BUSINESS.**—The fact that a person unlawfully imprisoned has been released and is no longer restrained of his liberty is material in ascertaining the time he has lost from his business by the detention. (Id.)
7. **MANNER AND REASON FOR RELEASE.**—The manner of the defendant's release need not be shown; and the reason of the court for his release in most cases would be immaterial, and in some cases perhaps prejudicial. (Id.)
8. **DISCHARGE ON HABEAS CORPUS—DAMAGES—COSTS AND ATTORNEYS' FEES.**—The fact that the plaintiff was discharged on *habeas corpus* was material to his allegation that he had been compelled to pay \$250 for costs and attorneys' fees to secure his release, and the proceedings on *habeas corpus* were admissible for this purpose. (Id.)
9. **ORDER OF ARREST NOT PREJUDICIAL.**—The introduction in evidence of the order of arrest by the defendant was not prejudicial, where

FALSE IMPRISONMENT (Continued).

the court instructed the jury that the affidavit on which it was based was insufficient to justify it. (Id.)

10. **RECORD ON DIFFERENT HABEAS CORPUS—EXCLUSION—RECORD NOT IDENTIFIED—PRESUMPTION AGAINST ERROR.**—The rejection of a record on *habeas corpus* against a different party offered by defendant, which is not identified nor brought up in the record, must be presumed not to have been erroneous. (Id.)
11. **UNPREJUDICIAL ERROR ON CROSS-EXAMINATION.**—*Held*, that the disallowance of certain proper questions asked by defendant on cross-examination of the plaintiff was not such prejudicial error as to justify the reversal of a judgment otherwise properly rendered. (Id.)
12. **DAMAGES RECOVERABLE—GENERAL AND SPECIAL DAMAGES.**—In an action for false imprisonment, the plaintiff may recover, as general damages, compensation for physical inconvenience, mental suffering, and humiliation of mind incident to the false arrest, and where expense for litigation in the *habeas corpus* proceedings were specially pleaded they are recoverable. (Id.)
13. **WAIVER OF UNCERTAINTY AS TO SPECIAL DAMAGES.**—No special demurrer having been interposed, any objection as to want of certainty in the allegation of special damages is waived; and the court properly admitted evidence thereof, and properly instructed the jury as to the law of special damages. (Id.)
14. **PROPER RULINGS AS TO INSTRUCTIONS.**—*Held*, that the instructions given for the plaintiff properly presented the law applicable to the case, and that instructions requested by the defendant, which were inapplicable to the evidence, or which were erroneous or misleading, were properly rejected. (Id.)

FALSE PRETENSES. See Criminal Law, 27-36.

FINDINGS. See Mortgage, 1-6.

FRAUD.

1. **ACTION FOR CONVERSION OF GOODS—PLEADING—FRAUDULENT SALE NOT ALLEGED—INADMISSIBLE EVIDENCE.**—In an action for conversion, in which the complaint merely alleges the conversion by defendant of lumber belonging to the plaintiff, where it appears in proof that the property was sold by plaintiff to a third party not made defendant, and that such third party sold the same to the defendant to pay a pre-existing debt, and no facts are alleged constituting the fraud of such third person in procuring the property from plaintiff through false representations, or showing a rescission of the sale for such fraud, or that defendant purchased with knowl-

FRAUD (Continued).

edge of the fraud, the court erred in admitting evidence of any fraudulent purchase vitiating the title of such third party, as against the defendant's title. (*Virginia Timber and Lumber Co. v. Glenwood Lumber Co.*, 256.)

2. **TRANSFER FOR PRE-EXISTING DEBT—VALUABLE CONSIDERATION—ERRONEOUS INSTRUCTIONS.**—By the law of this state, a transfer of personal property in consideration of a pre-existing debt is a transfer for a valuable consideration. Where there was no evidence that the transferee thereof for such debt had any knowledge of a prior fraudulent transfer from the plaintiff, instruction that a pre-existing debt is not a sufficient consideration to warrant the person securing the property to hold it as against the right of the person from whom the property was obtained by fraud in the purchase, and that the crediting of its value on the pre-existing debt would not make the second transferee an innocent purchaser for value, were erroneous. (*Id.*)
3. **FRAUDULENT CONVEYANCE—HUSBAND AND WIFE—SUPPORT OF FINDINGS.**—In an action by a wife to have her title quieted against judgment creditors of the husband, who are selling his property under execution, where the court finds, upon sufficient evidence, that on the day on which their judgment was rendered, he transferred property purchased with community funds in a large sum to the wife, for a nominal sum, and had the deed recorded in her name, with intent to hinder and defraud the judgment creditors of the husband, the findings in their favor will not be disturbed. (*Bekins v. Dieterle*, 690.)
4. **FRAUDULENT INTENT—OTHER PROPERTY IMMATERIAL.**—Where fraudulent intent is found upon sufficient evidence, the conveyance is void as to existing creditors, and the question whether the debtor has other property is immaterial. (*Id.*)

HABEAS CORPUS.

1. **CONVICTION UPON PLEA OF GUILTY OF BURGLARY IN FIRST DEGREE—DETERMINATION OF DECREE—JURISDICTION—PRESUMPTION.**—Upon a petition for *habeas corpus* the attack upon a judgment of conviction in the superior court upon a plea of guilty of burglary in the first degree is collateral, and every intendment is in favor of the judgment. Though it seems that, in such case, no substantial right of the defendant would be invaded by failure of the court to determine the degree, yet the only question upon *habeas corpus* is as to the jurisdiction; and if it be supposed necessary that the court should determine the degree, it must be presumed, where the record does not affirmatively show the contrary, that the court determined the degree upon sufficient evidence notwithstanding the plea. (*Ex parte Haase*, 541.)

HABEAS CORPUS (Continued).

- 2. TWO COMMITMENTS FROM JUSTICE COURT—SINGLE CHARGE OF PETIT LARCENY—VOID CUMULATIVE COMMITMENT—PRESUMPTIONS NOT INDULGED.**—Where two cumulative commitments of six months each on two judgments were made in the justice's court on what appears to be but one charge of petit larceny, there being nothing in the record to show the contrary, no presumption can be indulged in favor of the regularity of the proceedings in the justice's court, and it cannot be presumed that there were two complaints identical in their averments, but constituting two distinct crimes, to support the second commitment. It must be deemed void; and at the expiration of the first sentence of six months, the defendant is entitled to be discharged on *habeas corpus*. (In re Narvaez, 103.)

See Contempt, 1; Criminal Law, 1, 18, 78.

HOMESTEAD. See Divorce, 5.

HUSBAND AND WIFE.

- 1. ACTION FOR MAINTENANCE—EQUITY CASE—ORDER FOR ALLOWANCE PENDING SUIT—APPEAL—JURISDICTION OF SUPREME COURT—TRANSFER.**—One who has a cause of action for divorce may, without suing for a divorce, maintain a separate cause of action for maintenance, addressed to the equity jurisdiction of the superior court. An appeal from an order granting an allowance pending such action should be taken directly to the supreme court. When taken to this court, it cannot be dismissed, but must be transferred to the supreme court under section 4 of article VI of the constitution. (Hiner v. Hiner, 546.)
- 2. DESERTION—USE BY WIFE OF HUSBAND'S MONEY FOR SUPPORT—ACTION FOR RECOVERY NOT MAINTAINABLE.**—A husband is bound to support his wife, and where he has deserted her without just cause, and provides her with no means of support, she is entitled to use the money of the husband, which comes lawfully in her hands, with which to provide herself with the necessities of life, and in such case equity and good conscience will not permit the husband to recover the money from her as had and received to his use. (Whittle v. Whittle, 696.)
- 3. TRIAL—PLEADINGS MISSING FROM FILES—PRACTICE.**—Where at the trial the pleadings are missing from the files, the correct practice would be either to find the originals, or supply copies. Where they appear in the record, no injury appears in causing the trial to proceed without their presence. (Id.)
- 4. ACTION FOR MONEY HAD AND RECEIVED—STATUTE OF LIMITATIONS.**—An action for money had and received dates only from receipt of the money, and the fact that it was received upon a note since outlawed cannot affect the statute of limitations. (Id.)

HUSBAND AND WIFE (Continued).

5. **NOTE PAYABLE TO HUSBAND AND WIFE—SUIT BY HUSBAND—DEFENSE—PAYMENT TO WIFE—FORMER JUDGMENT NOT A BAR.**—Where the note was payable to both husband and wife, and in a former suit thereon by the husband to collect the note, in which the wife was made a defendant, a defense by the payee that he had paid the note to the wife as one of the payees, in which judgment was given to the wife, such former judgment cannot constitute a bar to an action by the husband against the wife for money had and received. (Id.)
6. **EQUITABLE DEFENSE TO MONEY HAD AND RECEIVED.**—The general principle is that in an action of money had and received the defendant may show any facts that entitle him to retain the money on legal or equitable ground, and if the right of the defendant to retain the money is equal to that of the plaintiff, the defendant must prevail. In an action by the husband against the wife for money had and received, it was error to refuse to allow her to prove in defense that the husband had willfully deserted her, without just cause, and that the money received was necessarily expended by her for the necessities of life. (Id.)

See Agency, 12; Community Property; Divorce; Fraud, 2.

INJUNCTION.

1. **PRELIMINARY ORDER—PURPOSE—MERITS NOT INVOLVED.**—A preliminary injunction is granted before a hearing on the merits has been had, and its purpose and sole object is to preserve the subject in controversy in its then existing condition, and, without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered until a full and deliberate investigation of the case is afforded to the party. Cases are not tried on their merits on pleadings and affidavits. (Knight v. Cohen, 296.)
2. **CONTROVERTED RIGHT AS TO PIPE-LINE—DESTRUCTION OF RIGHT—DISCRETION.**—Where the defendant admits the existence of a pipe-line used by plaintiff as a trustee for other owners of lands irrigated thereby, to be used by plaintiff on his own lands and those of other beneficiaries in trust for irrigation and domestic use, and the plaintiff asserts a user adverse to defendant for more than six years, and defendant claims that it existed under her license, which has been revoked, for the court to have allowed the destruction of the rights claimed by plaintiff preliminary to a hearing on the merits by regular trial in court would have been an abuse of discretion. (Id.)
3. **APPEAL—RESTRAINING ORDER—MERGER IN PRELIMINARY INJUNCTION.**—It seems that an appeal will not lie from an order denying

INJUNCTION (Continued).

a motion to dissolve a restraining order, or from an order denying a motion to discharge the same. Upon the hearing of the order to show cause why a preliminary injunction should not be granted, the restraining order falls with a denial of the injunction, and is merged in it if granted. (Id.)

4. **PRELIMINARY INJUNCTION—LIMIT OF CONTINUANCE—CONSTRUCTION OF AMENDMENT TO CODE.**—The amendment of 1895 to section 527 of the Code of Civil Procedure, fixing the limit of twelve months beyond which a preliminary injunction will cease to operate if certain conditions do not exist, applies equally, whether the injunction is granted after notice or *ex parte*, and involves no question of remedy by appeal, or of *res adjudicata*. At the expiration of the twelve months, if the conditions stated do not apply, the injunction becomes inoperative and the parties beneficially interested are entitled to have the court so declare. (*German Savings and Loan Society v. Aldrich*, 215.)
5. **PROPER EXERCISE OF JURISDICTION.**—It is a proper exercise of the court's jurisdiction to ascertain and find the facts as to the conditions; and declare by its order that the injunction is no longer in force, if the facts warrant such deduction. The only thing before the court is the ascertainment of the facts upon which the right depends. (Id.)
6. **DISSOLUTION OF TEMPORARY ORDER—ABORTIVE APPEAL—APPEAL FROM JUDGMENT UPON DEMURRER.**—A notice of appeal from an order denying plaintiff's motion for a temporary injunction, where the record shows that the temporary injunction was granted, is abortive as an appeal from an order dissolving the same; but where a general demurrer to the complaint was sustained, and final judgment was rendered thereon, from which an appeal is taken, it is immaterial whether or not an appeal was intended to be taken from the order dissolving the temporary injunction, because, if the facts stated are insufficient under the general demurrer to warrant final relief, they are insufficient to warrant the continuance of the temporary restraining order. (*Bishop v. Owens*, 83.)
7. **INSUFFICIENT COMPLAINT FOR INJUNCTION—GENERAL CONCLUSIONS.** A complaint for an injunction which does not state facts sufficient to determine how plaintiff's property will be permanently injured by the acts complained of, and which states merely general conclusions as to multiplicity of suits and irreparable injury, not warranted by any pleaded facts, does not state facts sufficient to constitute a cause of action for equitable relief to enjoin the acts complained of. (Id.)
8. **SUSPENSION OF LADDERS AND FALLS WITH ROPES ATTACHED FROM ADJOINING BUILDING—EASEMENT.**—When the acts complained of consist in the suspension of ladders and falls with ropes attached

INJUNCTION (Continued).

from an adjoining building, over and above plaintiff's roof, and the complaint fails to state the purpose thereof or to show how the continuation thereof would injure plaintiff's property, the mere averments that the continued trespass "will ripen into a right and easement on plaintiff's property" and will "constitute and create an obstruction to the free and peaceable use of the aforesaid property" are only the conclusions of the pleader. (Id.)

9. **REASON ASSIGNED BY COURT BELOW—DAMNUM ABSQUE INJURIA.**—Where it cannot be determined from the complaint whether or not the alleged acts are excusable under the rule of *damnum absque injuria*, applied by the court below, and the facts pleaded do not amount to a conjecture as to the purpose of the acts, we are not concerned with that particular reason assigned by the court for its ruling. It is sufficient that the ruling sustaining the demurrer was correct. (Id.)

See Appeal, 1.

INSTRUCTION. See Contract, 32; Criminal Law, 24-26, 55, 67-70; Fraud, 2; Negligence, 7, 18, 21-23.

INSURANCE.

1. **LIFE INSURANCE—UNPAID PREMIUM—FORFEITURE OF POLICY—LIMITATION OF AUTHORITY TO WAIVE—KNOWLEDGE OF ASSURED.**—Where a policy of life insurance provided that the failure to pay any premium when due would render the policy void, and that none of its terms can be varied or modified, nor any forfeiture waived, or premiums in arrears received, except by agreement in writing, signed by either the president, vice-president, secretary, or actuary, whose authority for this purpose will not be delegated, and that no other person has or will be given such authority, such limitation of authority is valid, and the assured is chargeable with knowledge of its terms. (Cayford v. Metropolitan Life Ins. Co., 715.)
2. **DELIVERY OF RECEIPT TO LOCAL SOLICITOR—UNAUTHORIZED EXTENSION OF TIME.**—The delivery of a receipt to a local solicitor to collect the premium when due confers upon him no power to extend the time for payment of the premium when due, or to waive a forfeiture resulting from nonpayment thereof when due. (Id.)

INTERVENTION.

1. **ACTION TO QUIET TITLE—TITLE CLAIMED BY INTERVENERS—EFFECT OF ORDER.**—An action to quiet title is one for the recovery of real property; and an order of the superior court granting leave to interveners, who claim title against the plaintiff, to intervene, determined that the interveners had an interest in the matter in litigation. (Townsend v. Driver, 581.)

INTERVENTION (Continued).

2. **RIGHTS OF INTERVENERS—PROCEDURE AND REMEDIES OF DEFENDANTS.**—Under section 387 of the Code of Civil Procedure, such interveners were entitled as parties to avail themselves of all the procedure and remedies to which the defendants were entitled for the purpose of defeating the action or resisting the plaintiff's claims. (Id.)
3. **ADVERSE INTEREST—POSITION OF INTERVENERS.**—Where the interveners claimed the exclusive title and served their complaint in intervention upon all parties, their claim to the subject matter is an interest adverse both to the plaintiff and to defendants; but as against the plaintiff, they occupy under the law the position of plaintiffs in intervention uniting with defendants in the cause in resisting the demands of the plaintiff in the cause. (Id.)
4. **INACTION OF DEFAULTING DEFENDANTS—INTERVENERS NOT PREJUDICED.**—The inaction of the defendants in permitting their default does not preclude the interveners from their relief. (Id.)
5. **RIGHT OF PLAINTIFF TO DISMISS—DISMISSAL AGAINST INTERVENERS—RELIEF AGAINST DEFENDANTS.**—Where it appears that the only relief sought by the interveners was that plaintiff take nothing and that interveners recover costs, the plaintiff had the right completely to dismiss the action against all of the defendants, and the interveners; but where he did not elect to do so, he had no right to dismiss the action as to the interveners only, and then proceed to take the relief sought against the other defendants, without disposing of the issues raised by the complaints in intervention, where the order allowing the intervention had not been set aside. (Id.)
6. **ERRONEOUS REFUSAL TO VACATE JUDGMENT.**—Where the partial dismissal against the interveners was by action of the plaintiff only, and not by order of the court, the court erred in refusing an application of the interveners to set aside the judgment against the defendants, because notice of the hearing was not served upon the interveners nor waived by them. (Id.)
7. **RECITAL IN JUDGMENT—DISMISSAL BY PLAINTIFF—ORDER OF COURT NOT PRESUMED.**—Where the judgment entered recited that the action as to the interveners was dismissed by plaintiff, and does not purport to make any order or direction upon the part of the court, the doctrine of intendment in favor of the judgment cannot be carried to the extent of presuming that done by the court which it expressly declares to have been done by the plaintiff. (Id.)
8. **LIMITED POWER OF COURT AS TO DISMISSAL—TRIAL UPON MERITS.**—The court has no other power of dismissal, either as an entirety or as against parties, except as authorized by section 581 of the Code of Civil Procedure. In all other cases the action must be tried upon its merits. An order dismissing the action as to the interveners would be unauthorized. (Id.)

IRRIGATION DISTRICT.

1. **PAYMENT OF INTEREST ON BONDED INDEBTEDNESS—REFUSAL TO LEVY ASSESSMENT—MANDAMUS—JURISDICTION.**—Where the board of directors of an irrigation district have refused to levy an assessment to pay the interest on its bonded indebtedness, and the board of supervisors, after a petition therefor, have refused to levy such assessment, as provided by the act of March 31, 1897, providing for the organization and government of irrigation districts, the superior court of the county in which the irrigation district is situated has jurisdiction to compel the levying of such assessment by the board of supervisors, in the absence of a showing that the office of its board of directors is not within the county. The presumptions are in favor of the jurisdiction of the court. (*Nevada National Bank of San Francisco v. Board of Supervisors of Kern County*, 638.)
2. **EXPENSE OF LEVY AND ASSESSMENT.**—The expense of the levy and assessment, in addition to the annual interest, is a proper charge against the irrigation district. (*Id.*)
3. **RIGHTS OF JUDGMENT CREDITORS TO WRIT OF MANDATE.**—A judgment creditor of an irrigation district has the right to call upon its board of directors to pay the judgment, and upon their refusal or neglect to do so, to have recourse to the supervisors, and, upon their refusal to levy an assessment sufficient to pay the judgment, to apply for a writ of mandate to compel such levy. (*Id.*)
4. **RES ADJUDICATA—EFFECT OF JUDGMENT ON ORIGINAL OBLIGATION.**—Neither the board of directors, nor the board of supervisors, nor the taxpayers of the district can defend the proceeding in *mandamus* on any of the grounds litigated, or which might be litigated in the action in which the judgment was rendered. The judgment does not create a new obligation, but simply presents, in a different form, the obligation already assumed, and affords the highest sanction of the law to its validity. (*Id.*)
5. **EXCESS OF JURISDICTION—PAYMENT OF JUDGMENT BY SUPERVISORS—NEW TRIAL NOT REQUIRED.**—The court exceeded its jurisdiction in directing the supervisors to pay plaintiff's judgment out of the moneys collected by them. Such direction should be stricken out; but the error does not necessitate a new trial. (*Id.*)
6. **CONSTITUTIONALITY OF SECTION 39.**—Section 39 of the act in question is not in violation of any provision in the present constitution of the state. (*Id.*)
7. **CONSTRUCTION OF STATUTE—LEVY TO PAY SEVERAL UNPAID INSTALLMENTS.**—One levy may be made under the statute to pay the aggregate amount of installments of interest and principal, which have fallen due in previous successive years. (*Id.*)
8. **JUDGMENT—FAILURE TO PROVIDE FOR OTHER CREDITORS—PRESUMPTION.**—The judgment in *mandamus* requiring a levy sufficient to

IRRIGATION DISTRICT (Continued).

pay plaintiff's debt is not erroneous because it fails to provide for other creditors. If there are other creditors whose claims the irrigation district is solicitous to have paid, it is fair to presume that it will not object to an increase in the levy to meet such other obligations. (Id.)

9. **PROPOSED BID FOR WORK—CERTIFIED CHECK—FORFEITURE—FINDINGS AGAINST EVIDENCE—INVALID PROCEEDING—SUPPORT OF JUDGMENT.** In an action to restrain the managers of defendant bank from paying a certified check, indorsed "not to be paid unless forfeited," which was delivered to the irrigation district defendant, with a sealed bid for proposed work on its canal system, the check to be returned if the bid was not accepted, and forfeited if the bid was accepted, and not complied with by plaintiff, where issue was joined as to the acceptance of the bid and noncompliance therewith by the plaintiff, and the court found against evidence as matter of fact that the averments of the complaint were true, and the denials and averments of the answer were untrue, a judgment for the plaintiffs can only be supported upon the theory that the court found, as matter of law, that the whole proceeding was invalid, and that the attempted acceptance and award were nugatory. (*Healey v. Anglo-Californian Bank, Limited*, 278.)
10. **FAILURE OF OFFICERS OF DISTRICT TO COMPLY WITH ESSENTIAL PROCEEDINGS—VOID CONTRACT—BIDDER NOT ESTOPPED.**—Where the officers of the irrigation district, which is a public municipal corporation, have dispensed or failed to comply with any of the essential proceedings prescribed by statute for investing them with power to contract, no liability is imposed upon the corporation by the contract, and the bidder, whose offer is a mere naked one, without consideration, is not estopped, by reason of his failure to comply therewith, from claiming the return of the check deposited with his bid, or from enjoining the payment thereof. (Id.)
11. **ADVERTISEMENT OF LESS THAN WHOLE WORK—OMISSIONS IN DESCRIPTION—INSUFFICIENT NOTICE.**—Where the advertisement under section 53 of the Wright Act was for less than the whole work, it is essential that the notice must describe the particular work to be done, as required in that section, so as to correspond with the plans and specifications thereof, which must relate to the same work, so as not to mislead bidders to their disadvantage, and the failure properly to describe the work rendered the notice insufficient. (Id.)
12. **UNCERTAINTIES AFFECTING COMPETITION IN BIDDING.**—Any uncertainties affecting competition in bidding, either as to the substantial terms of the proposed contract, or a substantial variance as to such terms between the notice to bidders and the plans and specif-

IRRIGATION DISTRICT (Continued).

ations, or in the plans and specifications, or as to the reserved power of the engineer to change the plans and require extra work without providing for compensation, rendered the whole proceedings invalid. (Id.)

JUDGMENT.

1. **JUDGMENT BY DEFAULT—VACATION—NOTICE AND AFFIDAVITS—CONJUNCTIVE FORM OF GROUNDS—CONSTRUCTION—SUFFICIENCY.**—The affidavits used on a motion to vacate a judgment by default are not to be construed with the strictness applied to a pleading in matters of form; and the fact that the grounds of the motion are stated conjunctively in the notice and affidavits filed, that "said defendant failed to answer in time through inadvertence, mistake, and excusable neglect," is not material. It is sufficient if the facts proved justify the action of the court in relieving the applicant on the ground of inadvertence, mistake, or excusable neglect. (*Montijo v. Sherer*, 736.)
2. **SUFFICIENCY OF SHOWING—ACTION FOR FORCIBLE ENTRY—EMPLOYMENT FOR ANSWERING DEFENDANT—RELIANCE UPON SUPPOSED OWNERSHIP—DISCRETION.**—Where the moving party was in the employ of a codefendant who answered the complaint, and who informed him that an interurban railway company was the owner of the premises and would take care of the suit, and that he need not bother about it, and that relying thereupon he failed to answer, under the circumstances he had the right to rely upon the statement that the corporation whom he believed was the real party in interest would protect him, and the fact that his employer had answered was a circumstance to be considered by the court, and the court properly exercised its discretion in favor of a trial of the case on its merits. (Id.)
3. **AFFIDAVIT OF MERITS—VERIFIED ANSWER.**—Although no sufficient separate affidavit of merits was embodied in the affidavits, yet where the verified answer to the complaint was filed with the affidavits, and a copy thereof was served with the notice and affidavits, such verified answer is of itself a sufficient affidavit of merits. (Id.)
4. **RES ADJUDICATA—MODE OF PROOF—COLLATERAL ATTACK—RECITALS OF JURISDICTIONAL FACTS—CERTIFIED COPIES OF JUDGMENT, FINDINGS AND PLEADINGS.**—Where a judgment is offered as an estoppel, jurisdiction to render it must appear. The usual manner of proof of jurisdictional facts is to offer the judgment-roll; but where the attack upon a judgment rendered in the superior court is collateral, its recitals showing acquisition of the jurisdiction of the parties are evidence of the facts recited, and every intendment must be indulged in favor of the judgment. In such case, certified copies of the judgment, findings and pleadings are admissible to show what

JUDGMENT (Continued).

issues were concluded by the judgment, as against the parties and their privies, though unaccompanied by the judgment-roll. (*Page v. Garver*, 383.)

5. **JUDGMENT AGAINST INTESTATE—HEIRS AND WIDOW CONCLUDED.**—A judgment binding upon an intestate is binding upon his heirs at law, and a judgment which would estop him in life would bar an action for the same cause by his widow, who stands in his shoes, after his death. (*Id.*)
6. **IDENTITY OF ISSUES—ACTION BY PRIVY IN ESTATE—ESTOPPEL BY FORMER JUDGMENT.**—For the purpose of determining whether the issues determined by the former judgment are the same as those presented in an action by a privy in estate of the losing party, resort may be had to the pleadings and findings introduced in evidence in connection with the former judgment, and where it appears that the issues are the same, and that the same evidence would be required to support the former action which would be required in the one at bar, the plaintiff is estopped by the adjudication therein had. (*Id.*)
7. **VACATION—MISTAKE OF LAW BY ATTORNEY—RELIEF IN EQUITY—INSUFFICIENT COMPLAINT.**—Though a complaint in equity to vacate a judgment may disclose a sufficient ground for relief by motion under section 473 of the Code of Civil Procedure, addressed to the discretion of the court, for a mistake of law on the part of the defendant's attorney, had such motion been made in time, yet, the time having elapsed for such motion, the mere averment of such mistake of law in the complaint, not occasioned by any act of the defendant causing the plaintiff to default in an action brought by the defendant to quiet title to a water right against the plaintiff, states no cause of action for relief in equity against the judgment in such action. (*Amestoy Estate Company v. City of Los Angeles*, 273.)
8. **MISTAKE IN ACCEPTING OPINION OF ATTORNEY—RIPARIAN RIGHTS—CLAIM OF WATER RIGHT BY CITY.**—Where the complaint shows no mistake of fact on plaintiff's part, and the only mistake, if any, was in accepting the opinion of plaintiff's own attorney, as matter of law, that the claim of a water right on the part of the city was superior to that of the plaintiff as a riparian owner on the stream, which alone led it to make default in an action to quiet the city's title to the water against the adverse claim of the plaintiff, the rule is applicable that "neither the ignorance, the blunders, nor the misapprehension of counsel, not occasioned by the adverse party, is any ground for vacating the judgment or decree." (*Id.*)
9. **FALSE CLAIM OF CITY—ISSUE TENDERED BY COMPLAINT—CONCLUSIVENESS OF JUDGMENT.**—Conceding that the city's claim to the entire water of the stream was false and fraudulent as against the

JUDGMENT (Continued).

plaintiff, as a riparian owner, and might have been successfully defended, yet as an issue was tendered upon the claim, and the plaintiff, as defendant, was called upon to set forth any adverse claim on its part, the claim of the city was in no sense collateral to the merits of the action; and the judgment declaring the adverse claim is conclusive, where there was no concealment or imposition upon the court, and no extrinsic or collateral fraud is shown on the part of the city to prevent a fair submission of the controversy. (Id.)

10. **JUDGMENT UPON EVIDENCE—PRESUMPTION—INCONSISTENT AVERMENT OF VOID JUDGMENT.**—Where the judgment set forth in the complaint shows that it was not merely rendered by default, but that it was ordered in accordance with the prayer of the complaint, the presumption is that it was rendered upon competent evidence, and the plaintiff cannot be heard in this proceeding in equity to question the sufficiency of the evidence presumably before the court, which was by it determined to warrant the judgment, and an inconsistent averment that it was an unauthorized and void judgment by default is controlled by the judgment set forth. (Id.)
11. **NEW TRIAL—APPEAL FROM ORDER—INSUFFICIENCY OF EVIDENCE—EFFECT OF REVERSAL.**—A reversal by the appellate court of an order denying a new trial, on the ground assigned, that the findings were not justified by the evidence, has the effect to award to the parties a new trial. The parties occupy the same position under such reversal as though no trial had ever been had. The case is before the court below for trial *de novo* of all issues of fact, upon such proper amendments to the pleadings as the court may allow; and the parties have the right, upon the new trial, to introduce any and all competent evidence. (Riley v. The Loma Vista Ranch Company, 25.)
12. **ERRONEOUS JUDGMENT UPON MOTION, WITHOUT TRIAL—FORMER JUDGMENT AGAINST CODEFENDANTS.**—Where the superior court, after the going down of the *remittitur*, awarded judgment in favor of the respondent against the appellant upon motion, based upon a former judgment rendered in his favor against codefendants of the appellant, without any trial or findings of fact against the appellant, the judgment is erroneous and must be reversed. (Id.)
13. **ABSENCE OF FINDINGS NOT WAIVED—JUDGMENT NOT SUPPORTED—RIGHT OF APPEAL NOT WAIVED.**—There being no findings and no waiver of findings, the judgment is unauthorized. It cannot be deemed supported by the former findings set aside upon reversal. The mere failure of appellant's counsel to object to the procedure adopted by the court did not have the effect to waive the right of the appellant to appeal from the erroneous and unsupported order

JUDGMENT (Continued).

and judgment rendered against appellant upon motion, without the new trial allowed by this court. (Id.)

See Appeal, 1, 3, 5, 6; Attachment, 10-12; Contract, 30; Corporations, 6; Divorce, 5, 6; Eminent Domain, 2, 3; Estates of Deceased Persons, 2-4; Habeas Corpus; Husband and Wife, 5; Irrigation District, 3, 4, 8; Intervention, 5-8; Justice's Court, 3, 4; Mechanics' Liens, 7; Quieting Title, 1-3; Slander, 1.

JURISDICTION. See Contempt, 4, 5; Contract, 29; Criminal Law, 16; Divorce, 5; False Imprisonment, 1; Habeas Corpus, 1; Husband and Wife, 1; Irrigation District, 1, 5; Judgment, 1; Justice's Court, 2-4; Place of Trial; Prohibition, 1.

JURY AND JURORS. See Contract, 25; Criminal Law, 73-76; Negligence, 3.

JUSTICE'S COURT.

1. **APPEAL FROM JUSTICE'S COURT—EFFECT OF FAILURE OF SURETIES TO JUSTIFY.**—Upon an attempted appeal from the justice's court, where the sureties fail to justify when required to do so, the appeal must be regarded as if no undertaking had been given, and the cause remains in the justice's court until a new undertaking is filed or until the sureties justify. (*Lane v. Superior Court of Kings County*, 762.)
2. **ABSENCE OF JURISDICTION OF APPEAL—PROHIBITION.**—In such case where the justification of the sureties was abandoned, and an undertaking was filed more than thirty days after the rendition of the judgment, the appeal is ineffectual, and the superior court has no jurisdiction thereof; and prohibition will lie to prevent the superior court from trying the case. (Id.)
3. **JUDGMENT BY DEFAULT—TIME OF ENTRY—CONSTRUCTION OF CODE—MINISTERIAL DUTY—DIRECTORY PROVISIONS—JURISDICTION.**—Section 871 of the Code of Civil Procedure does not direct a justice of the peace to enter a judgment by default within any prescribed time. Section 911, subdivision 4, and section 912 of the same code, requiring the justice to enter on his docket "the time when the parties or either of them appear, or their nonappearance if default be made," and to make these entries "at the time when they occur," merely provide for ministerial duties and are directory. The failure to execute a ministerial duty in proper time does not deplete the court of jurisdiction. (*Hall v. Justice's Court of the City and County of San Francisco*, 133.)
4. **LENGTH OF DELAY IN ENTERING JUDGMENT—JURISDICTION NOT EXCEEDED—FAILURE TO APPEAL—WAIT OF REVIEW.**—The fact that

JUSTICE'S COURT (Continued).

there was a delay of eight years in entering a judgment by default in the justice's court after the return of the service of summons upon the defendant does not show an excess of jurisdiction. A writ of review does not lie to annul the judgment, where jurisdiction was not exceeded in its entry, nor can the writ be granted where an appeal may be taken, or where, by the neglect of the applicant in failing to appeal, the right of appeal has been lost. (Id.)

See Criminal Law, 16, 17; Habeas Corpus, 2; Prohibition.

LANDLORD AND TENANT. See Lease.**LARCENY. See Criminal Law, 16-18.****LAW OF CASE. See Stare Decisis.****LEASE.**

1. **FIXED TERM—SPECIFIED RENTAL—PARTIAL RECEIPT—CONSTRUCTION.**—A lease bearing date September 25, 1905, and acknowledging receipt from the lessees named of \$20 on account of "old Schien store, at a monthly rental from Oct. 1, of \$125 per month for first six months, i. e., to April 1st; of \$75 per month for the remainder of the year closing Oct. 1, 1906; \$105 due and payable," and signed by the lessors, under which the lessees entered October 1, 1905, and paid, is by its terms a fixed lease for one year. The fact that it is in part a receipt is immaterial. (Dodd v. Pasch, 686.)
2. **PAROL EVIDENCE—TENANCY FROM MONTH TO MONTH.**—Parol evidence is inadmissible to vary the terms of such lease by showing that it was leased from month to month, and that the lessor terminated it by notice. (Id.)
3. **ESSENTIALS OF LEASE.**—The only essentials of a lease are that it shall clearly show the names of the contracting parties, premises leased, the rental, and the term. (Id.)
4. **TIME OF PAYMENT OF RENT NOT ESSENTIAL.**—The time of payment of the rent need not be specified in the lease, for when not stated nor governed by usage, it is fixed by law, by the terms of section 1947 of the Civil Code. (Id.)
5. **SIGNATURE OF LESSEES NOT ESSENTIAL—ACCEPTANCE.**—It is sufficient that the lease is signed by the lessor. The signatures of the lessees are not essential; but they manifest their acceptance of the lease by entering under it and paying the rent. (Id.)
6. **LIEN OF LESSOR FOR ADVANCES—PREVENTION OF CROPS—ACT OF GOD—RECOVERY BACK OF ADVANCES.**—Where, by the terms of a lease, the lessees were to farm the land leased for crops of grain and hay, and to make a specified advance to the lessors, and there-

LEASE (Continued).

after a monthly sum on demand, and all advances made were to be a lien on the lessors' share of the crops with interest when harvested, and where, after using all possible endeavor to raise crops thereon, the crops were prevented and wholly destroyed by the act of God, through the agency of floods, the lessees were not bound to make any further advances on demand, and were entitled before the expiration of the lease to sue to recover back the amount of advances made with interest. (*Carstenbrook v. Wedderien*, 603.)

7. **SUFFICIENCY OF FINDINGS—PASTURAGE OF STOCK—COUNTERCLAIM BY LESSORS.**—*Held*, that the findings for the plaintiffs sufficiently cover all of the material issues raised by the pleadings; and when the court found that no crop of hay could be raised or cut upon the land, and that, after the flood, a very small quantity of grass grew thereon, mixed with weeds, on which sheep and cattle could be and were pastured by plaintiffs for a limited time, the plaintiffs were entitled to such pasturage, and findings that plaintiffs were entitled thereto, and that defendants take nothing by their counterclaim for the alleged value thereof, sufficiently respond to the issues raised by the counterclaim. (*Id.*)
8. **UNLAWFUL DETAINER—ESTOPPEL OF LESSEE—RIGHT TO SHOW TERMINATION OF LESSOR'S TITLE.**—Though in an action of unlawful detainer the lessee is estopped from denying the title of the lessor, as it stood when the lease was executed, he is not estopped to show that the title of the lessor has expired or has been extinguished, or has been alienated from him by operation of law. (*Teich v. Arms*, 475.)
9. **SALE TO STATE FOR TAXES—FAILURE OF REDEMPTION—TITLE FROM STATE—ATTORNMEN BY TENANT.**—Where the land leased was sold to the state for taxes, and the right of the lessor to redeem after the execution of a deed to the state was foreclosed by the state's conveyance of the title to another owner, such owner has the right to receive the rents, and it is the duty of the tenant to attorn to the owner. (*Id.*)
10. **ACTION AGAINST PRIOR LESSEE OF STORE—WRONGFUL WITHHOLDING FROM SUBSEQUENT LESSEE—DAMAGES—DEFENSE—SETTLEMENT OF PRIOR SUIT AGAINST LESSOR—INSTRUCTION—SUPPORT OF VERDICT.** In an action by a subsequent lessee of a store to recover damages against a prior lessee for the wrongful withholding thereof after the term, in which defendant pleaded in bar a prior action to recover the same damages against the lessor, which was settled and dismissed upon the lessor's payment of costs and plaintiff's attorney's fees, where the court instructed the jury that if they found that the actual damages sued for against the lessor had entered into the settlement and dismissal of the prior suit, plaintiff could not recover them against the lessee, and the jury found a general

LEASE (Continued).

verdict for the plaintiff for the actual damages claimed against the prior lessee, such verdict amounts to a finding that such actual damages were not included in such settlement, and there being evidence to support it, the verdict will not be disturbed upon appeal. (Snyder v. Regan, 64.)

11. **COMPETENCY OF EVIDENCE AS TO SETTLEMENT—RECEIPT IN GENERAL TERMS—RELEASE OF ALL CLAIMS.**—It was competent to show what matters entered into the settlement and dismissal of the prior suit against the lessor, even though the receipt in general terms released the lessor from all claims of damages against him. (Id.)
12. **PLEADING—OWNERSHIP OF BUSINESS DAMAGED.**—An averment that plaintiff was a merchant in the city where the storeroom was leased, and conducted a store business in that city, and that in view of increasing his business he leased the storeroom wrongfully withheld, and was injured in his business because he could not remove his goods thereto, is a sufficient averment of the ownership of the business damaged as against a general demurrer. (Id.)
13. **DEPRECIATION IN VALUE OF GOODS TO BUSINESS.**—An averment that "the goods depreciated in value to plaintiff's business," sufficiently alleges a loss to the business conducted by plaintiff, in relation to such goods as he would have been enabled to sell but for the tortious act of defendant. (Id.)
14. **SUPPORT OF VERDICT—CONFLICTING EVIDENCE AS TO OWNERSHIP AND DAMAGE.**—Where there was a conflict of evidence as to plaintiff's ownership of the business, and as to whether the damages thereto could have been avoided by the use of ordinary diligence, as well as to the amount of damages suffered on account of the various items specified in the complaint, and as to whether his goods actually depreciated in value, to his injury, and there was some testimony to support the verdict for plaintiff, it is conclusive as to all such questions. (Id.)
15. **ITEMS OF DAMAGE—REVIEW UPON APPEAL.**—Where the agreed proof is such as to warrant the jury in determining generally the damage to the extent found by them in their verdict, it is not incumbent upon the appellate court to enter upon a calculation as to the elements of damages, and what may or may not have been considered, or the weight or effect which was given to any particular testimony as to items of damage, nor to examine the items to determine whether the jury considered some small item, where the testimony was very slight. (Id.)

LIEN. See Mechanics' Liens.

LIFE INSURANCE. See Insurance.

MANDAMUS. See Irrigation District, 1, 3; Mechanics' Liens, 7; Municipal Corporations, 8; Office and Officers, 2.

MASTER AND SERVANT. See Negligence, 6-10.

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

1. **VOID CONTRACT—PRIOR COMMENCEMENT OF WORK—OMISSION TO PROVIDE FOR FINAL PAYMENT.**—Where the work on a building to cost \$3,100 was commenced and materials furnished prior to the execution and record of the contract, and it omitted to provide for the final payment of twenty-five per cent of the contract price at least thirty-five days after completion of the building, the contract is void as to all persons performing labor or furnishing materials on the building. (*Stimson Mill Co. v. Nolan*, 754.)
2. **STATEMENT FOR BENEFIT OF CONTRACTOR—STATUTE NOT COMPLIED WITH.**—The mere statement in the contract, for the benefit of the contractor, that the owner might pay the whole amount, when receipts were produced, cannot be construed as a substantial compliance with the statute as to the last payment, or even an attempt in that direction, where it appears that the whole contract price was payable upon completion, and the last payment was treated by the parties as the completion payment, the amount of which was depleted by the expenses of completion made necessary by the contractor's abandonment of the contract. (*Id.*)
3. **EQUALITY OF RIGHTS OF LIEN CLAIMANTS.**—The court erred in refusing to award a lien for the full value of the material and labor to those who bestowed the same after the contract was filed. The constitutional provision which gives to mechanics, materialmen, artisans and laborers of every class a lien upon the property upon which they bestowed labor or furnished materials places such parties in the same class. Their equality is established by the constitution and cannot be impaired or destroyed by the legislature. One lien claimant cannot be preferred over others. (*Id.*)
4. **ATTORNEYS' FEES NOT ALLOWABLE.**—Lien claimants cannot be allowed attorneys' fees in an action to foreclose their liens. (*Id.*)
5. **LIEN UPON STRUCTURE AND LAND CONSTITUTIONAL.**—It is no infringement upon an existing right of property in the owner of land upon which a structure is placed by his own act to cause the lien given upon the structure to extend to the land necessary for its use. (*Id.*)
6. **EFFECT OF CODE SECTIONS—CONSTITUTION—RIGHTS OF OWNERS OF PROPERTY.**—Sections 1183 and 1184 of the Code of Civil Procedure, regulating the terms required for the validity of building contracts

MECHANICS' LIENS (Continued).

in excess of \$1,000, are not invalid, as impairing any existing right of the owner of the property. Those sections confer a right not previously existing, by which his liability is curtailed; if these sections did not exist or are not complied with, the constitution itself guarantees a lien to the full value of all labor or material bestowed or furnished. The owner cannot be injured, but is afforded security, if he honestly complies with those sections. (Id.)

7. **FORECLOSURE—MONEY DUE CONTRACTOR—DEPOSIT BY OWNER TO ABIDE JUDGMENT—APPEAL—STAY BOND—MANDAMUS.**—In a consolidated mechanics' lien suit for foreclosure of liens against the owner of the property and the contractors, where the owner deposits in court the amount due to the contractors to abide the judgment therein, and to be applied in satisfaction thereof as the court may direct, the deposit must be construed to refer to the judgment finally rendered; and where an appeal is taken by the owner, upon a stay bond, he is not entitled, pending the appeal, to a writ of mandate to compel a return of the deposit, in the absence of an order of the court to that effect and a refusal to obey it by the custodian of the money. (*Higgins v. Keyes*, 482.)

MINES AND MINING. See Ejectment, 1, 4.

MINORS. See Criminal Law, 78; Divorce, 3.

MISTAKE. See Judgment, 7-10.

MORTGAGE.

1. **QUIETING TITLE—OUTLAWED MORTGAGE BY THIRD PARTY—RULE AS TO PAYMENT INAPPLICABLE—BURDEN OF PROOF—FINDINGS.**—The rule that a mortgagor or his successor, with notice of the mortgage, cannot quiet title against the mortgagee, though the debt is outlawed, without first paying the debt, is inapplicable, where the mortgage is by a third party, and the defendant does not sustain the burden resting upon him to allege and prove the connection of plaintiff's title therewith, and where it is alleged and found that plaintiff's title originated from the state subsequently to the mortgage, and was adverse thereto, and it is found that at the time of the commencement of the action plaintiff was the owner and seised in fee of the premises. In such case, the findings justified a decree quieting plaintiff's title against the outlawed mortgage, which is not found or shown to have ever been a lien on plaintiff's title. (*Marshutz v. Seltzor*, 140.)
2. **CROSS-COMPLAINT TO FORECLOSE MORTGAGE—ANSWER—PLEA OF STATUTE—FINDINGS.**—Where the defendant sought by cross-complaint to foreclose the outlawed mortgage, and the answer thereto

MORTGAGE (Continued).

pleaded that the action was barred by section 337 of the Code of Civil Procedure, a general finding that the action "was barred by the statutes of California," followed by a finding "that said claim of the defendant Klumpke under the mortgage security so assigned to him is over forty years past due, and has not been prosecuted in any way until the filing of the cross-complaint," sufficiently shows that the action on the note and mortgage was barred by the section pleaded. (Id.)

3. **AFFIRMATIVE PROCEEDING TO ENFORCE OUTLAWED DEBT.**—A proceeding under a cross-complaint to foreclose a mortgage is an affirmative proceeding to collect the debt secured by the mortgage, and where the debt is outlawed and the statute is pleaded, no decree of foreclosure should be entered, though the cross-complaint is in an action to quiet title against the mortgagee. (Id.)
4. **COMPELLING ADVERSE FINDING—REMOVAL OF CLOUD UPON TITLE.**—It seems that by setting up the outlawed mortgage by way of cross-complaint to foreclose it, the appellant having compelled a finding that the mortgage was barred, which resulted in a denial to him of any relief thereon, he has practically caused the removal of any cloud that might exist on plaintiff's title by reason of the existence of the mortgage. (Id.)
5. **UNCERTAINTY IN FINDINGS—CONSTRUCTION IN FAVOR OF JUDGMENT.**—Any uncertainty in the findings arising from a finding that the mortgagor had an interest which antedated plaintiff's title, suggesting a possible inference that plaintiff's title may have been subordinate thereto, must be so construed, in connection with the other findings, as to uphold the judgment rather than to defeat it. (Id.)
6. **CONSTRUCTION AGAINST JUSTICE.**—Justice does not demand that uncertainties in findings should be so construed as to give vitality to a claim forty-five years past due, bearing interest at the rate of three per cent per month, and for which the present holder is found to have paid nothing. (Id.)
7. **ACTION FOR BREACH OF CONTRACT—SALE OF LAND—ASSUMPTION OF CHATTEL MORTGAGES—CLAIMS OF DEFENDANT—BURDEN OF PROOF—FINDINGS.**—In an action to recover damages for a breach of contract by the defendant, in consideration of a sale and conveyance of land to him by the plaintiff, to assume and pay two chattel mortgages on the orange crop growing on the land conveyed and also upon plaintiff's remaining land, where the defendant by answer and cross-complaint alleged that it was agreed that the entire crop was to belong to defendant, and that the crop taken by the mortgagee was removed by plaintiff without defendant's consent, the burden of proof was upon the defendant to prove his allegations, and where he failed to do so, the court properly found against him in that regard. (Hurwitz v. Gross, 614.)

MORTGAGE (Continued).

8. **SINGLE CAUSE OF ACTION—ELEMENTS OF DAMAGE—MISJOINDER NOT SHOWN.**—Where the complaint counted on a cause of action for damages for breach of the contract in an aggregate sum, but divided the aggregate amount of the two chattel mortgages assumed by defendant into two elements of damage—the first, for partial failure of the consideration of the conveyance, measured by the proceeds of oranges belonging to plaintiff, which were applied toward payment of the chattel mortgages so assumed; and second, the unpaid balance necessary to clear plaintiff's remaining land from the lien of the mortgages—it states but one cause of action for breach of the contract to plaintiff's injury, and shows no misjoinder of causes of action. (Id.)
9. **UNCERTAINTY OR AMBIGUITY NOT MISLEADING.**—Where there is no uncertainty or ambiguity which could mislead the defendant in pleading to the complaint, a demurrer on that ground was properly overruled. (Id.)
10. **PARTIES—MORTGAGEE.**—The mortgagee was neither a necessary nor a proper party to the action for breach of the contract made by the defendant with the plaintiff to assume and pay off the mortgages. (Id.)
11. **ESTOPPEL OF DEFENDANT—ASSUMPTION OF MORTGAGE MADE BY THIRD PARTY—DIRECTION TO MORTGAGEE.**—Where the larger crop mortgage was executed by a third party, and constituted a lien on all of plaintiff's crops, its assumption by defendant, in consideration of the conveyance of land to him, estopped him from questioning whether plaintiff's obligation to pay it was a legal or moral one; and having directed the mortgagee to apply the proceeds of plaintiff's oranges to its payment, he is estopped to deny the validity and enforceability of the obligation against plaintiff's demand for a repayment of the money so applied. (Id.)
12. **CONSTRUCTION OF CONTRACT—EVIDENCE, PURPOSE AND CIRCUMSTANCES.**—In ascertaining the meaning of the language of the contract, evidence showing its purpose or object, and the circumstances surrounding its execution, was admissible, and must be taken into consideration in its construction. (Id.)
13. **EVIDENCE—EXHIBITS AND RECORDS OF CORPORATION MORTGAGEE—IDENTIFICATION.**—Exhibits, copies of account sales check sheets of the corporation mortgagee showing particulars of oranges received and sold by it for account of plaintiff, also, a "ledger sheet" and "weigher's receiving account slip," all of which were identified as original papers and records of the corporation by their proper custodian, were admissible in evidence. (Id.)

See Pleadings, 3-5.

MUNICIPAL CORPORATIONS.

- 1. LICENSE—SALE OF LIQUORS—COUNTY ORDINANCE—ARBITRARY REFUSAL BY SUPERVISORS—MANDAMUS—FINDINGS—REVIEW UPON APPEAL.**—Under a county ordinance regulating liquor licenses, where applicants for a license had been refused, and upon their petition for a writ of mandate to compel its issuance, the court found that they had followed the prescribed method to obtain the license under the ordinance, that they were fit and proper persons, that no exception was taken by the supervisors to their character or standing, and that the supervisors arbitrarily rejected their petition without cause, and the court granted the mandate, if no evidence is returned upon appeal from the judgment, it must be assumed that the evidence supported the findings and the judgment must be affirmed. (*Reed v. Collins*, 494.)
- 2. PROVISION IN ORDINANCE FOR “DUE CONSIDERATION”—ARBITRARY DISTINCTION.**—The provision in the ordinance for “due consideration” of an application for a license simply means a consideration of the application upon its merits, and the return of a judgment based upon some substantial reason arising upon evidence heard, and does not justify an arbitrary distinction against the applicants. (*Id.*)
- 3. GROUNDS OF REFUSAL MATERIAL—EXERCISE OF POLICE POWER.**—The grounds upon which the governing body of a city or county bases its action in the refusal of a license to sell liquor by retail are extremely material and important. They are not confined to the terms of the ordinance, since, under a proper exercise of the police power granted by the constitution, a license may be refused upon sufficient grounds stated, shown by the evidence before it, addressed to the unfitness of the applicant, or the unsuitableness of the place at which the saloon is to be located. (*Id.*)
- 4. CONCLUSIVENESS OF REJECTION FOR GOOD REASON.**—When the evidence is taken upon a sufficient ground, and the result is the rejection of the application, the action of the governing board in ordering such rejection is conclusive, and not a question for judicial determination, unless it is made to appear that the evidence in no manner or degree developed any good reason for the rejection. (*Id.*)
- 5. MUNICIPAL CHARTER—RECALL OF ELECTED OFFICER—CONDITIONAL TENURE OF OFFICE.**—Where a municipal charter provides that the holder of any elective office may be removed at any time by the electors qualified to vote for a successor, subject to the condition that twenty-five per cent of the electors of the district express their disapproval of his action upon some measure or as to some policy, and demand that he be sustained by a vote of confidence or retire, the charter does not contemplate an ordinary “removal for cause,” but by virtue of the charter provision, every elective officer

MUNICIPAL CORPORATIONS (Continued).

elected after the provision was adopted holds his office subject to the condition subsequently expressed therein. (*Good v. Common Council of the City of San Diego*, 265.)

6. **SUFFICIENCY OF REASON EXPRESSED FOR RECALL.**—The recall petition of the twenty-five per cent of electors is only required to contain a general statement of the grounds of dissatisfaction on which the removal is sought, and it is sufficient that it appears in general terms that the official conduct of the officer whose recall is sought has been in opposition to the will and preferences of his constituents and obstructive to the best interests of the city. (*Id.*)
7. **CERTIFICATE OF CITY CLERK—NUMBER OF QUALIFIED SIGNERS.**—The certificate of the city clerk required by the charter that he has compared the names on the petition of electors of the district for recall of the officer named with the great register of the county, and has found the petition to be sufficient, shows a proper exercise of the authority devolved on the city clerk to hear and determine the sufficiency of the petition, from whose determination no appeal is provided. (*Id.*)
8. **MANDAMUS TO CITY COUNCIL—RIGHT OF ELECTOR.**—The city council have no discretion or right to refuse to act upon the petition in reference to the calling of an election, and *mandamus* will lie on the face of a sufficient petition, upon which the council have refused to act, at suit of any one or more of the electors whose names appear therein, to compel it to act. (*Id.*)
9. **MUNICIPAL ORDINANCE—POLICE POWER—RESTRICTION OF LIQUOR TRAFFIC.**—The law-making power of a municipal corporation has the right, under the police power, to restrict the sale of intoxicating liquors; and a municipal ordinance prohibiting the sale of all intoxicating liquors therein, excepting a specified permission to hotel-keepers to sell vinous and malt liquors served in the dining-room thereof as part of a regular meal, is a valid exercise of the police power of the municipality. (*Application of Kidd*, 159.)
10. **CONSTITUTIONAL LAW—UNIFORMITY IN OPERATION.**—The constitutional requirement with reference to the uniformity in operation of all laws of a general nature has no application to ordinances enacted in pursuance of the police power to regulate the liquor traffic, in which there is an unjust discrimination. (*Id.*)
11. **NO INHERENT RIGHT TO ENGAGE IN LIQUOR TRAFFIC—OPERATION OF EXCEPTION.**—There is no inherent right in a citizen to engage in the sale of intoxicating liquors; and where an exception to the ordinance prohibiting such right is based upon a reasonable distinction, and applies alike to all hotel-keepers of the class excepted, one not belonging to that class, who is imprisoned for a violation of the ordinance, has no just cause of complaint, by reason of the exception. (*Id.*)

MUNICIPAL CORPORATIONS (Continued).

12. **BERKELEY CHARTER—PROVISION AUTHORIZING PENALTY FOR ILLEGAL SALE OF LIQUORS—CONFLICT WITH PENAL CODE.**—The charter of the town of Berkeley, having been adopted prior to the amendment of 1896 to the constitution, was subject to general laws; and the trustees had no power thereunder to pass an ordinance affixing a penalty for the sale of liquors without a license in conflict with the Penal Code, and the original invalidity of such power was not affected by that amendment. (*Ex parte Sweetman*, 577.)
13. **VOID PENALTY UNDER ORDINANCE—CONVICTION UNDER PENAL CODE.**—A conviction in the justice's court of the town of Berkeley of a misdemeanor for the sale of liquor without a license, as required by an ordinance of the town, containing a void penal clause, is valid under the Penal Code, and the higher penalty affixed therein may be imposed. (*Id.*)
14. **MUNICIPAL INCORPORATION ACT—AMENDMENT—TOWNS OF SIXTH CLASS—REPEAL OF CODE PROVISIONS.**—By the amendment of the municipal incorporation act, March 9, 1903, section 3366 of the Political Code was repealed by implication, as far as regards towns of the sixth class. (*Ex parte Mogensen*, 596.)
15. **MUNICIPAL ORDINANCE—PROHIBITION OF LIQUOR TRAFFIC—POLICE POWER.**—By the re-enactment of subdivision 10 of section 862 of the municipal act of 1883 in the amended municipal incorporation act of 1903, as respects towns of the sixth class, a town of that class has police power under section 11 of article XI of the constitution to pass a municipal ordinance prohibiting the liquor traffic. (*Id.*)
16. **HABEAS CORPUS—SUFFICIENCY OF COMPLAINT.**—A complaint charging conjunctively in the language of the ordinance all of the alternative prohibitions therein contained, as having been unlawfully and willfully done on a date specified must be deemed, upon *habeas corpus*, to be certainly a sufficient statement of the offense intended to be charged. (*Id.*)
17. **SUFFICIENCY OF JUDGMENT—RECITAL OF VIOLATION OF ORDINANCE—DESIGNATION OF OFFENSE.**—A judgment of conviction reciting that the petitioner was duly convicted of violating an ordinance of a town named of the sixth class, designated by its number and title, and adjudging the offense of violating the same, as charged in the complaint, and that it be punished by a suitable fine, contains a sufficient designation of the offense charged. (*Id.*)
18. **MUNICIPAL CORPORATION—VALIDITY OF ACTION OF SUPERVISORS—REMEDY—CERTIORARI—QUO WARRANTO.**—*Certiorari* will not lie to test the validity of the action of the supervisors in declaring territory described in its order to be duly incorporated as a municipal corporation of the sixth class, under a specified name. The proper remedy is by a proceeding in *quo warranto*. (*Beaumont v. Samson*, 491.)

MUNICIPAL CORPORATIONS (Continued).

19. **ACTION AGAINST MUNICIPAL CORPORATION—TORTS ULTRA VIRES—INJURIES TO PROPERTY—INSUFFICIENT COMPLAINT.**—A complaint in an action against a municipal corporation, setting forth acts of tort on the part of the defendant, willfully and wantonly causing injury to plaintiff's property, and preventing the plaintiff from continuing its lawful business, to the plaintiff's damage alleged, states acts of tort *ultra vires* to the municipal corporation, for which it cannot be held responsible, and states no cause of action against it. (Healdsburg Electric Light & Power Company v. City of Healdsburg, 558.)

See Irrigation District.

MURDER AND MANSLAUGHTER. See Criminal Law, 19-26.

NEGLIGENCE.

1. **ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE OF DECEASED—SUPPORT OF FINDINGS.**—In an action to recover for the death of a person alleged to have been caused by the negligence of the defendant, in which the negligence was denied and the contributory negligence of the deceased was put in issue, it is held that, notwithstanding a conflict in the evidence, there is sufficient evidence to sustain the findings that the defendant was not guilty of negligence, and that the deceased was guilty of contributory negligence. (Higgins v. Los Angeles Ry. Co., 748.)
2. **EVIDENCE—SPEED OF CAR—RULINGS NOT PREJUDICIAL.**—Where five witnesses had testified that the car was running at a speed not to exceed eight miles per hour, supposing, without holding, that objections sustained to two other witnesses as not experts, who were asked as to the speed of the car, one of whom testified that it was running thirty miles per hour, were erroneous in view of the evidence as to independent contributory negligence, such rulings could not be prejudicial. (Id.)
3. **ACTION FOR DEATH—NONSUIT AT CLOSE OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—CONSTITUTIONAL LAW—JURY TRIAL.**—In an action for death, where it clearly appeared at the close of all of the evidence for both parties that the deceased was guilty of contributory negligence, and that if the case had been submitted to the jury it would be the duty of the court to set aside a verdict for the plaintiff, a nonsuit was properly granted. Such action of the court was not violative of the constitutional right of trial by jury. (Bohn v. Pacific Electric Ry. Co., 622.)
4. **FUTURE DAMAGES RESULTING FROM INJURY—EXPERT EVIDENCE OF PHYSICIANS.**—In an action for an injury resulting from negligence in order to justify a recovery for future consequences, the evidence must show with reasonable certainty that such consequence

NEGLECT (Continued).

will follow. Where the injury was to the base of the brain, the testimony of experienced physicians is admissible to show that with reasonable certainty future evil consequences will result from the injury. (*Cordiner v. Los Angeles Traction Co.*, 400.)

5. **COLLISION—CONCURRING NEGLIGENCE OF RAILWAY COMPANIES—RULE OF “LAST CLEAR OPPORTUNITY” INAPPLICABLE.**—Where the plaintiff was injured by a collision resulting from the concurring negligence of two street railway companies, the plaintiff may recover against either or both of them, and the rule of “the last clear opportunity to avoid the injury” is inapplicable, there being no contributory negligence of the plaintiff. In such case, the plaintiff, while in pursuit of her rights against both defendants, cannot be involved in a litigation to determine the respective rights of the defendants as against each other. (*Id.*)
6. **MASTER AND SERVANT—INDEPENDENT CONTRACTOR—QUESTION OF FACT FOR JURY.**—In an action by a servant for damages caused by the negligence of defendant as his employer in failing to furnish safe appliances, where there is a dispute whether plaintiff was the servant of the defendant or of independent contractors, and it appears that plaintiff was paid by defendant, and the evidence is such that the existence of the relation of independent contractors is in doubt, its existence is a question of fact for the jury, and a verdict for the plaintiff will not be disturbed upon appeal. (*Giacomini v. Pacific Lumber Co.*, 218.)
7. **INSTRUCTION SUBMITTING QUESTION OF FACT—DETAIL OF EVIDENCE.** Where the court, in submitting to the jury the question of fact whether the persons claimed to be independent contractors were such or mere servants of the defendant, properly instructed them as to the law of the case, though it may have been unnecessary to detail the evidence, the action of the court in calling attention particularly to the evidence which must be the basis of the jury’s finding cannot be successfully assailed. (*Id.*)
8. **UNSAFE APPLIANCE—EVIDENCE OF NEGLIGENCE—SUPPORT OF VERDICT.**—Where the evidence shows that the machine on which plaintiff was injured was originally unsafe, and that an appliance was put thereon to make it less dangerous, in respect to which the master was negligent in failing in his duty to keep it secure, or to inspect the machine and appliance, and in failing to warn plaintiff, who, in ignorance of the manner in which it was fastened, was requested by an inexperienced workman to adjust the loosened appliance, to his injury, the evidence of negligence is sufficient to support the verdict for damages. (*Id.*)
9. **ACTION FOR DEATH—NEGLECT OF FELLOW-SERVANT.**—An employee is not liable for a death caused by the negligence of a fellow-servant of the deceased, employed in the same general

NEGLIGENCE (Continued).

- business by the same employer, where there was no negligence of the employer in employing such fellow-servant, and no remissness in the conduct of the employer toward the deceased. (*Schwind v. Floriston Pulp etc. Co.*, 197.)
10. CONTRIBUTORY NEGLIGENCE OF DECEASED—WALKING BETWEEN CARS LIABLE TO BE MOVED—LACK OF ORDINARY CARE.—The deceased was guilty of contributory negligence in attempting to cross a railroad track between the cars of a train which were liable to be moved at any time, without taking any precaution to avoid the injury, which he might have avoided by the use of ordinary care. (*Id.*)
11. PUNITIVE DAMAGES.—Simple negligence, unaccompanied with oppression, fraud or malice, cannot justify an award of punitive damages for the resulting injury. (*Spencer v. San Francisco Brick Co.*, 126.)
12. NEGLIGENT CONSTRUCTION OF BULKHEAD—BREAKAGE IN WET WEATHER—SLIGHT INJURY—EXCESSIVE DAMAGES—NEW TRIAL.—In an action for damages arising from the negligent construction of a bulkhead by defendant on his premises, which, after standing for two years, gave way in wet weather and damaged slightly the rear end of plaintiff's premises, where there is no evidence that the injury was willfully or wantonly done, or of gross negligence in the construction or use of the bulkhead, or of any oppression, fraud or malice, a verdict for punitive damages is excessive, and a new trial should be granted therefor. (*Id.*)
13. NEGLECT TO REPAIR DAMAGES AFTER REQUEST—OPPRESSION NOT SHOWN.—The mere neglect of the defendant, after request, to repair the damage, which was unintentionally, though negligently, done, cannot be said to show oppression by subjection of the plaintiff to cruel and unjust hardships. The plaintiff had an immediate legal remedy for his damages, which only interfered with the use of a small part of his lot, to a trifling extent. (*Id.*)
14. CONTRIBUTORY NEGLIGENCE—QUESTIONS OF FACT AND LAW.—Where the facts are such that reasonable men may fairly differ as to whether there was negligence or contributory negligence or not, in a case of personal injury, the determination of the matter is a question of fact for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is one of law for the court. (*Doyle v. Eschen*, 55.)
15. MIXED QUESTION OF LAW AND FACT.—Usually the consideration of negligence, including contributory negligence, involves a mixed question of law and fact, in which it devolves upon the court to say, as matter of law, what is or amounts to negligence, and upon the jury to say, as matter of fact, whether or not in the particular case the facts proved show negligence. (*Id.*)

NEGLIGENCE (Continued).

16. **MOTION FOR NONSUIT—QUESTION OF CONTRIBUTORY NEGLIGENCE—FACTS TAKEN AS PROVED—INFERENCES AGAINST DEFENDANT.**—Upon a motion for a nonsuit on the ground that contributory negligence is shown by the plaintiff's evidence, every fact that plaintiff's evidence proves or tends to prove must be taken by the court as proved, and must be taken in the strongest light against the defendant, and interpreted most strongly against him. (Id.)
17. **MOTION PROPERLY DENIED—QUESTION FOR JURY.**—*Held*, that plaintiff's evidence, admitting that his testimony was somewhat inconsistent and partly absurd, does not show as matter of law that he was guilty of contributory negligence, and that it was proper to deny the motion, and to submit the question of contributory negligence to the jury. (Id.)
18. **CONTRIBUTORY NEGLIGENCE—INSTRUCTION—APPLICABILITY TO EVIDENCE.**—In an action to recover for injuries alleged to have been sustained by defendant's train while plaintiff was crossing the track, where the evidence clearly shows that if plaintiff and defendant were both negligent, their negligence was contemporaneous and concurrent, and extending up to the very time of the accident, an instruction to the effect that if the jury believe that plaintiff did not exercise reasonable and ordinary care to prevent the injury he cannot recover, notwithstanding defendant's negligence, unless it was gross, willful and intentional, is not objectionable, for not using the words "proximate contributory negligence," nor for not stating the rule of "the last clear opportunity." (*Jansen v. Southern Pacific Co.*, 12.)
19. **"PROXIMATE CONTRIBUTORY NEGLIGENCE"—DEFINITION.**—"Proximate contributory negligence" is that negligence of plaintiff which in a natural and continuous sequence, unbroken by any independent cause, contributes to the injuries, and without which the injuries would not have occurred. (Id.)
20. **CONTRIBUTORY NEGLIGENCE OF TRAVELER CROSSING TRACK—FAILURE TO LOOK AND LISTEN.**—It is the duty of a traveler when attempting to cross a railroad track to look and listen for an approaching train, and it is contributory negligence for him to expose himself to danger without making any effort to ascertain whether a train was approaching by which he was injured. (Id.)
21. **INSTRUCTIONS TO BE READ TOGETHER—PROXIMATE CONTRIBUTION.**—Instructions are to be read together; and where an instruction was embodied in the charge as to the negligence of plaintiff, cautioning the jury that they must find whether "plaintiff was guilty of negligence which proximately contributed to his injuries," the omission of "proximate contributory negligence" in the particular instruction objected to was not prejudicial. (Id.)

NEGLIGENCE (Continued).

- 22. INAPPLICABLE INSTRUCTION—"LAST CLEAR OPPORTUNITY"—ACTUAL KNOWLEDGE OF PERIL ESSENTIAL.**—An instruction as to the "last clear opportunity" was wholly inapplicable where there was nothing in the evidence to support it. It is essential to the applicability of the doctrine of later negligence of the engineer that he must have been actually aware of plaintiff's danger in time to have obviated it; and where the evidence shows that after his discovery of plaintiff's peril and inattention to danger the engineer did all he could to prevent the accident, no later negligence on his part existed. (Id.)
- 23. INSTRUCTION AS TO WILLFUL INJURY NOT PREJUDICIAL.**—Though defendant would have no right in any event to injure the plaintiff wantonly, willfully and with an intentional purpose to hurt him, and though an instruction on that subject might have been eliminated, owing to the fact that there was no issue or evidence as to wanton and intentional injury, its presence could not prejudice the appellant. (Id.)
- 24. FIRING SHOT BY POLICE OFFICER AT RUNAWAY HORSE—INJURY TO PLAINTIFF—APPEAL—CONFLICTING EVIDENCE.**—In an action to recover for an alleged injury to the plaintiff, by the negligent firing of a shot by defendant as a police officer at a runaway horse, where it appears that two other shots were fired at the horse by other persons about the same time, and that there is ample evidence in the record to justify the court in finding that the shot fired by defendant was not the cause of the injury to plaintiff, notwithstanding a conflict in the evidence, the finding for the defendant cannot be disturbed upon appeal. (*Nelson v. McCarty*, 773.)

NEW TRIAL.

- 1. STATEMENT—OMISSION OF SPECIFICATIONS—REFUSAL TO ALLOW AMENDMENT—DISCRETION—REVIEW UPON APPEAL.**—Though an order refusing to allow a supplemental amendment to the statement on motion for new trial to add thereto specifications wholly omitted therefrom by oversight and excusable neglect, under section 473 of the Code of Civil Procedure, is reviewable upon appeal therefrom, yet such order was addressed to the discretion of the trial court, and where the review upon appeal shows no abuse of discretion, the order refusing to grant the relief will be affirmed. (*Freeman v. Brown*, 516.)
- 2. ORDER GRANTING NEW TRIAL—REVIEW UPON APPEAL—INSUFFICIENT RECORD—PRESUMPTION.**—Upon appeal from an order granting a new trial, the appellant must present a record which affirmatively shows error in the granting of the motion. In the absence of a bill of exceptions showing the grounds of the motion and what was used upon the motion, where the record does not establish the con

NEW TRIAL (Continued).

trary, it will be conclusively presumed in favor of the order that it was in part based upon some ground upon which affidavits could be used, and that such were used, and were sufficient to justify the order. (Thompson v. Wheeler, 195.)

3. **STATEMENT ON MOTION FOR NEW TRIAL.**—A statement on motion for a new trial which may be sufficient on appeal from an order denying the motion may be wholly insufficient to show error in the granting of the motion. It is the duty of the party who would show such error to see that the record establishes it. (Id.)

See Appeal, 2, 3, 9, 10; Judgment, 11-13; Negligence, 12.

NONSUIT.

1. **ACTION FOR MONEY LOANED—EVIDENCE—ERROR IN NONSUIT.**—In an action for money loaned by a corporation, where the plaintiff's evidence showed that the corporation had authorized its president officially, as such, to draw checks for the moneys; that he had no money in bank to his own credit; that the checks of the corporation were signed by him officially in favor of the defendant for the amount of the alleged loan, and were cashed by defendant and returned to the secretary, after the president's death; that defendant had admitted receiving the money; that it had not been repaid; and that the deceased president had stated to the secretary that the money had been loaned to the defendant—the court erred in granting a nonsuit. (Archibald Estate v. Matteson, 441.)
2. **EFFECT OF MOTION FOR NONSUIT—DEMURRER TO EVIDENCE—QUESTION OF LAW—INFERENCES OF FACT.**—A motion for a nonsuit cannot be granted where plaintiff's evidence *tends* to establish the material averments of the complaint. The motion operates practically as a demurrer to plaintiff's evidence, and assumes the truth of the facts proved and of all reasonable presumptions and inferences of fact therefrom, and presents a pure question of law for the court. (Id.)
3. **INCOMPETENT EVIDENCE—HEARSAY—CROSS-EXAMINATION.**—Where hearsay evidence which had been excluded in chief was brought out by the defendant on cross-examination of the secretary, as to declarations made by the deceased president, effect must be given to it on the motion for nonsuit. Error in admitting evidence for the plaintiff cannot be reviewed on motion for a nonsuit. (Id.)
4. **INAPPROPRIATE FINDINGS ON MOTION—CREDIBILITY OF WITNESSES—PROBATIVE POWER.**—It was inappropriate for the court to make findings of fact on the motion for a nonsuit. The question of the credibility of witnesses cannot arise upon such motion except to give to the testimony for plaintiff its full probative power. (Id.)

NONSUIT (Continued).

5. TRIAL BY COURT—IMMATERIAL DISTINCTION AS TO NONSUIT.—There is no difference in the power and duty of the court, when sitting as a jury, and when trying a case by jury, as regards the decision of a motion for nonsuit, the rules for the decision of which are the same in either case. The only question to be decided is whether plaintiff's evidence has made a *prima facie* case. (Id.)

OFFICE AND OFFICERS.

1. JUSTICES OF THE PEACE—SALARIES IN LOS ANGELES TOWNSHIP.—Under the act of March 18, 1907, establishing a new system of county and township governments, by amendments of the Political Code, the four justices of the peace provided for in Los Angeles township, in section 4114 thereof, are, by the provisions of subdivision 15 of section 4231 thereof, each entitled to receive a salary of \$3,000 per annum, payable in like manner and out of the same fund and at like times as county officers. (Summerfield v. Dow, 678.)
2. CONSTITUTIONAL LAW—COMPENSATION IN PROPORTION TO DUTIES.—Such provision does not violate section 5 of article XI of the state constitution, requiring the compensation of officers to be regulated in proportion to duties. The adjustment of compensation by salaries in large cities, and fees in smaller cities, towns, and nonurban communities, proceeds upon intrinsic differences. (Id.)
3. SAN FRANCISCO CHARTER—ASSISTANT DISTRICT ATTORNEY—ORDINANCE PROVIDING ADDITIONAL ASSISTANT—SALARY—MANDAMUS.—An ordinance of the city and county of San Francisco, duly passed, providing for the appointment of an additional assistant district attorney to those authorized by the charter, makes him a legal assistant or deputy district attorney, and the appointment is of the same dignity as if the ordinance had been embodied in the charter; and *mandamus* will lie to compel the auditor to draw a warrant for his salary payable out of the general fund, as fixed in the ordinance. (Harrison v. Horton, 415.)
4. CONSTRUCTION OF CHARTER—SPECIFIC APPROPRIATION—SALARY OF OFFICER.—The provision of the San Francisco charter forbidding the auditor to draw warrants except upon an unexhausted specific appropriation has no application to the salary of an officer fixed under express authority of the charter in a valid ordinance. (Id.)

See Municipal Corporations.

PARTNERSHIP.

1. GOODS SOLD AND DELIVERED—PLEADING—PARTNERSHIP LIABILITY—WAIVER OF NONJOINDER.—A recovery may be had upon a partnership liability against one of the partners sued individually, where
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PARTNERSHIP (Continued).

he fails to plead a nonjoinder of his copartner. Such failure operates as a waiver of objection. (*Baker & Hamilton v. Lambert*, 708.)

2. **EVIDENCE—SALE TO PARTNERSHIP.**—In such case evidence is admissible for the plaintiff to show that a partnership existed between defendant and a third person, and that the goods sold and delivered were sold and delivered to such partnership; and it was error to refuse to admit such evidence. (*Id.*)
3. **ACTION FOR SERVICES—AMENDMENT TO ANSWER—DISCRETION—SETTLEMENT WITH PARTNERSHIP—REFUSAL NOT PREJUDICIAL.**—In an action for services, although a proposed amendment to the answer to set up a settlement between plaintiff and a partnership of which defendant was a member, and payment in full, might well have been allowed so as to present the case upon its merits, yet it cannot be held that the court abused its discretion in refusing it, where its action was not prejudicial, it appearing that the action was tried upon the theory that the settlement was in issue. (*Miner v. Rickey*, 451.)
4. **INDIVIDUAL ACTION—EVIDENCE—JOINT OBLIGATION—INSTRUCTION—MATERIAL VARIANCE.**—In an action for services against a defendant individually, where defendant's evidence, received without objection, tended to prove that any liability in favor of plaintiff was against a partnership of which defendant was a member, the defendant was entitled to an instruction that if the jury found that the services were rendered at the request of the defendant acting as a member of the partnership to the plaintiff's knowledge, their verdict should be for the defendant. In such case the obligation would be joint, and the instruction is addressed to the question of a material variance between the complaint and the evidence. (*Id.*)
5. **HEARSAY EVIDENCE—PREJUDICIAL ERROR.**—It was prejudicial error to admit hearsay evidence either to prove the value of plaintiff's services, or to corroborate the testimony of plaintiff that he was employed by the defendant, or to show a conversation with the register of the state land office, to excuse delay in a suit for years that should have been dismissed on motion. (*Id.*)

PARTY-WALL.

1. **CONTRACT FOR CONTRIBUTION—PLEADING—GRAVAMEN OF COMPLAINT.**
In an action to recover one-half of the cost of the erection of a party-wall, under a written contract to contribute one-half thereof to the one actually building the wall, the gravamen of the complaint is the building of the wall by one coterminous owner, and the use thereof by the other, without contributing his part of the cost of erection. (*Watkins v. Glas*, 68.)

PARTY-WALL (Continued).

2. **PAYMENT OF COST OF WALL IMMATERIAL.**—It is not necessary to aver that the party erecting the wall has paid the cost of its erection, before the action for contribution under the contract therefor is brought, nor is it a defense that plaintiff has not paid the cost of erection to the builder employed to erect it. (Id.)
3. **UNCERTAINTY IN PLEADING—GENERAL DEMURRER.**—Where the complaint is sufficient as against a general demurrer, the fact that some of its averments are uncertain cannot be considered where no special demurrer for uncertainty was interposed. (Id.)
4. **SUFFICIENCY OF COMPLAINT—PARTY-WALL AGREEMENT—APPRAISEMENT OF COST BY AGREED ARCHITECT.**—A complaint which alleges the agreement of the parties to bear an equal proportion of the expense of the erection of the wall, that it was erected by one of them, that the cost thereof was appraised by the architect agreed upon between the parties, and the notification to defendants of such appraisal, and alleges that defendants are making use of the wall, and have not paid their share of the burden of its erection, is sufficient as against a general demurrer. (Id.)
5. **RELATION OF DEBTOR AND CREDITOR—ASSIGNABILITY OF RIGHT OF ACTION.**—The complaint shows the relation of debtor and creditor between the parties, and the party erecting the wall became vested with a right of action against the other party, which was assignable, and enforceable by the assignees, subject to any defense or counterclaim against the assignor. (Id.)
6. **DEFENSE UNPROVED—CONCLUSIVE FINDING.**—Where no evidence is offered upon a defense pleaded, the finding that the allegations of such defense are untrue is unassailable. (Id.)
7. **ORDER OF PROOF—OPENING OF CAUSE—MOTION OF DEFENDANT—JUDGMENT PLEADED IN ABATEMENT AND IN BAR—DISCRETION.**—Where the *onus* was upon plaintiff to prove the averments of the complaint denied by the answer, the court properly exercised its discretion in denying a motion of defendant to open the case first by proving a former judgment pleaded in bar and in abatement of the action. The proper time for such proof was after plaintiff had proved his case; and where defendant then failed to make such proof, the plea cannot be considered. (Id.)
8. **EVIDENCE—CONTRACT BY CORPORATION WITH PLAINTIFF TO BUILD WALL—ASSIGNMENT BY CORPORATION—PRIMA FACIE EXECUTION.**—A contract between a corporation, party to the party-wall agreement, and the plaintiffs to construct the party-wall was admissible to show the fact of its construction thereunder; and the assignment by the corporation to the plaintiffs, executed by its president and secretary, and attested by its corporate seal, was a *prima facie* showing of a due execution thereof, which was sufficient, in the absence of other evidence overcoming it. (Id.)

PARTY-WALL (Continued).

9. **ERROR IN AGREED APPRAISEMENT—BURDEN OF PROOF.**—If there was any error or mistake in the agreed appraisal, which appears to have been conducted in accordance with the terms of the party-wall agreement, the burden was upon the defendants to show it. (Id.)
10. **SUPPORT OF FINDINGS AND JUDGMENT.**—*Held*, that the evidence sufficiently supports the findings and sustains the judgment for plaintiffs. (Id.)

PAYMENT. See Checks, 1-4.**PLACE OF TRIAL.**

1. **VENUE OF ACTION—SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY REAL ESTATE—PLACE OF COMMENCEMENT.**—An action to compel the specific performance of a contract to convey mining claims situated in another county may be brought in the county of the residence of the defendant. It is not an action "for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate," required by the constitution to "be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated." (*Wood v. Thompson*, 247.)
2. **CONSTRUCTION OF CONSTITUTIONAL PROVISION—LIMITATION UPON JURISDICTION OF SUPERIOR COURT.**—The constitutional provision limiting the place of commencement of certain enumerated actions, being a limitation upon the general jurisdiction of the superior court, is to be strictly construed; and its prohibition must be confined to the actions enumerated therein. (Id.)

PLEADINGS.

1. **ACTION FOR INDEBTEDNESS—LEGAL CONCLUSION IMPLYING FACT—JUDGMENT BY DEFAULT.**—A complaint averring that defendants "within two years last past became indebted to the plaintiff" in a specified sum, followed by other proper averments, though it states a legal conclusion as to the indebtedness, merely implying the material fact, is sufficient, in the absence of a demurrer, to support a judgment by default. (*Kilillea v. Wilson*, 6.)
2. **SUFFICIENCY OF COMPLAINT—REVIEW UPON APPEAL.**—The sufficiency of a complaint to support the judgment must be reviewed on an appeal from the judgment. (*Wells, Fargo & Company v. McCarthy*, 801.)
3. **COMPLAINT UPON FORECLOSURE OF MORTGAGE—SUFFICIENCY OF AVERMENT OF OWNERSHIP—ASSIGNMENT BY EXECUTRIX—PRESUMPTION UPON APPEAL.**—Where a complaint upon the foreclosure of a mortgage alleged an assignment by the executrix of the will of

PLEADINGS (Continued).

a deceased person, "pursuant to order duly made in the matter of the estate" of such deceased person, without averring specifically what order was made in such matter, and also alleged an indorsement and delivery of the note to plaintiff by the executrix without recourse, and that plaintiff has ever since been, and now is, the holder and owner thereof, it must be presumed in favor of the judgment, in the absence of a bill of exceptions, that it was shown without objection that an order of sale and an order confirming the sale were properly made by the superior court, and that the cause was tried on the theory that the complaint was sufficient, and technical objections raised for the first time on appeal must be disregarded. (Id.)

4. **ATTEMPT TO ALLEGE ORDER OF COURT—LEGAL CONCLUSION—ULTIMATE FACT OF OWNERSHIP ALLEGED.**—There being no attempt to allege the orders of the court, even if the allegation relative thereto be deemed a mere legal conclusion and surplusage, the allegation of ownership of the note and mortgage should be construed as an averment of an ultimate fact sufficient to supply the defect and to support the judgment. (Id.)
5. **PROPOSED AMENDMENT BY SUBSEQUENT LIENHOLDER—NOVATION—STATUTE OF LIMITATIONS—DISCRETION.**—The court did not abuse its discretion in refusing to permit an amended answer to be filed more than four years after issue joined, so as to plead a novation of the indebtedness on the note and mortgage, which was barred by the statute of limitation as against a subsequent lienholder, and thus defeat the plaintiff's mortgage and unjustly assert priority of defendant's lien thereto. (Id.)
6. **ASSUMPSIT—WORK AND LABOR DONE—EXECUTED CONTRACT.**—A complaint to recover for work and labor done in grading and excavating for the defendants, within two years, for which they agreed to pay to the plaintiff a specified sum, is in effect an *indebitatus assumpsit* count at common law. Such pleading is allowable under our code; and its use carries with it the general rule applicable to such counts. (Donagan v. Houston, 626.)
7. **OMISSION OF USUAL AVERMENTS—IMPLIED CONSIDERATION AND PROMISE.**—Though the complaint lacks the ordinary averments of indebtedness, and that the services were rendered at defendant's request, yet these averments are unnecessary when the consideration as well as the promise are implied from the nature of the transaction declared upon. (Id.)
8. **DISTINCT DEBTS UNDER DIFFERENT CONTRACTS.**—Under an *indebitatus assumpsit* count, several distinct debts due in respect of different contracts not under seal of the same or different nature, as demands for work, and debts for goods, money lent, etc., might always be included in one count of this description, and whatever

PLEADINGS (Continued).

is due may be recovered thereunder. It is not necessary to declare specially, however special the agreement may have been, when plaintiff has performed the terms and the remuneration was to be in money. (Id.)

9. **EXPRESS AND IMPLIED CONTRACTS—GRADING AND EXTRA WORK—ACCOUNTS STATED—ITEMS.**—The plaintiff may recover in one count under an executed express contract for grading completed, and also under an implied contract for extra work, as together constituting the whole indebtedness due, and where an account was stated for the whole indebtedness, the law implies a promise to pay it. It was not necessary to plead any of the items from which the result was obtained, the only remedy of the defendants being to demand a bill of particulars under section 454 of the Code of Civil Procedure. (Id.)
10. **PLEADING—ISSUE UNDER IMPLIED AVERMENT—WAIVER OF ENGINEER'S CERTIFICATE—UNJUST AND FRAUDULENT DETENTION—PERSONAL QUARREL.**—The issue as to whether there was a waiver of the engineer's certificate required of the plaintiff was properly tried by the court, under the implied allegation that the contract was fully executed and performed, and that nothing remained but to pay the money agreed. The plaintiff might, without express pleading, prove that the engineer's certificate was unjustly and fraudulently detained, without warrant, owing to a personal quarrel. (Id.)
11. **FINDINGS WITHIN PLEADINGS—SUPPORT BY EVIDENCE.**—*Held*, that all the findings for plaintiff are within the pleadings, and are supported by sufficient evidence. The weight of the evidence will not be considered where there is a substantial conflict therein. (Id.)
12. **OBJECTIONS TO COMPLAINT CURED BY ISSUES UNDER DEFENDANT'S PLEADINGS.**—Where all of the issues which it is claimed the complaint should have tendered were set forth by the answer, counterclaim and cross-complaint of the defendants and issues joined thereon by plaintiff's answer thereto, any objections to the insufficiency of the complaint are thereby waived and cured; and where the case was tried and findings made for plaintiffs upon the issues tendered by defendant's pleadings, the judgment cannot be reversed because of the objections made to the complaint, even if it be conceded that they were tenable. (Id.)

See Agency, 4; Attachment, 1-5; Bill of Particulars; Contract, 22, 23, 27, 30; Eminent Domain, 7, 10; False Imprisonment, 4; Frauds, 1; Injunction, 7; Intervention; Judgment, 7-10; Mortgage, 8, 10; Partnership, 1; Party-wall, 1-5; Quieting Title, 3, 4; Specific Performance, 3, 4; Trust, 4.

PLEDGE.

1. **TRANSFER OF STOCK—RIGHT TO REPURCHASE.**—Where it appears that a transfer of one-half the stock in a corporation by plaintiff to defendant was contemporaneous with a right given to repurchase the same, that the stock had a substantial value, and that defendant neither paid nor agreed to pay anything in consideration of its transfer to him, that none of plaintiff's existing liabilities as a stockholder were canceled or assumed by defendant, and as a condition of the retransfer plaintiff was to pay one-half of the money which a bank had loaned or would loan the company, further security being given for future loans to the company, the transfer of the stock is to be deemed a pledge and not a sale thereof. (*Keifer v. Myers*, 668.)
2. **AGREEMENTS—SINGLE TRANSACTION—LANGUAGE OF SALE NOT CONTROLLING.**—The agreements whereby the stock was transferred to the defendant and the plaintiff was given the right of repurchase constituted one and the same transaction, and are to be taken together in view of all the circumstances of the case. The use of the words "Sold, transferred, and assigned," and the recital that defendant is the owner of the stock cannot change the character of the transaction. For the purpose of ascertaining the real contract between the parties, the court looks beyond the terms of the instrument. (*Id.*)
3. **ACTION TO REDEEM FROM PLEDGE—NONSUIT.**—In an action to redeem from the pledge, a motion for a nonsuit admitted the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom. *Held*, that a motion for a nonsuit, in view of the evidence for plaintiff, was improperly granted, and that the judgment of nonsuit must be reversed. (*Id.*)

PRACTICE. See Appeal; Attachment; Bill of Exceptions; Bill of Particulars; Costs; Evidence; Execution; Injunction; Intervention; Judgment; New Trial; Nonsuit; Place of Trial.

PRINCIPAL AND AGENT. See Agency.

PROHIBITION.

1. **REMEDY BY APPEAL—JURISDICTION TO TRY ACTION IN JUSTICE'S COURT.**—A writ of prohibition will not lie to prevent the trial of an action where there is a plain, speedy and adequate remedy by appeal from the final judgment rendered therein. Whether a justice's court has or has not jurisdiction to try an action, where it appears that the summons was not served or returned within three years from the commencement of the action, the method of appealing from the judgment of the justice's court is simple and expeditious and an appeal may be taken upon questions both of law and of

PROHIBITION (Continued).

fact; and prohibition will not lie in the superior court to prevent the trial of the action. (*Hubbard v. Justice's Court of San Jose Township*, 90.)

2. **APPEAL—STIPULATION OF PARTIES—MOOT QUESTION.**—Upon appeal to this court from a judgment of the superior court denying a writ of prohibition to the justice's court, the parties cannot by stipulation limit the inquiry in this court to the moot question, not arising upon the record, whether section 581 of the Code of Civil Procedure applies to justices' courts. (*Id.*)

See Criminal Law, 20, 77; Justice's Court, 2.

PROMISSORY NOTE.

1. **WAIVER OF INTEREST AFTER MATURITY—EXECUTED ORAL AGREEMENT.**—An executed oral agreement between the owner of a note and the payee, upon sufficient consideration, to waive the payment of interest thereon after maturity, had the effect to change the stipulation of the note as to such interest. (*Righetti v. Righetti*, 249.)
2. **CONDITIONAL DEPOSIT OF MONEY IN BANK—EXTINGUISHMENT NOT EFFECTED.**—A deposit of money in bank for the purpose of extinguishing a note under the provisions of section 1500 of the Civil Code must be unconditional, and must have the effect to make the deposit the property of the person to whose credit it is placed; and a deposit of money made conditionally upon the surrender of the notes is insufficient to extinguish the obligation of the note for which the deposit was made. (*Id.*)

QUIETING TITLE.

1. **ACTION TO QUIET TITLE—AFFIRMATIVE DEFENSE—FORMER JUDGMENT—ESTOPPEL.**—In an action to quiet title, where the court sustained an affirmative defense that defendant had obtained a former judgment quieting his title to the same property, under the same issues against one for whom the plaintiff in the present action who claims the property is a mere agent, the former judgment pleaded operates as an estoppel against the plaintiff, and the defendant's source of title is immaterial. (*Keller v. McGilliard*, 395.)
2. **FAILURE OF EVIDENCE—TITLE NOT TO BE RELITIGATED.**—The real plaintiff cannot relitigate the title to the property involved in the former judgment, notwithstanding he failed to show of what the title claimed by him consisted at the time of the former trial. If a party fails to assert his claim properly, or to present the proper evidence in the first suit, he will not be permitted to litigate it in a second suit. (*Id.*)
3. **UNNECESSARY CROSS-COMPLAINT—REFUSAL OF MOTION TO STRIKE OUT NOT PREJUDICIAL.**—The refusal of the court to strike out an unnecessary cross-complaint, which presented no issues other than

QUIETING TITLE (Continued).

those presented by the complaint and answer, is without prejudice, where no judgment was rendered upon the cross-complaint, but only an affirmative defense set up in the answer. (Id.)

4. **OFFICE OF CROSS-COMPLAINT.**—A cross-complaint in an action to quiet title may be used to present a case for affirmative relief in order to preclude a dismissal of plaintiff's action and to compel a determination of the rights of the parties to the action. (Id.)

See Intervention, 1; Mortgage, 1-5.

QUO WARRANTO. See Municipal Corporations, 18.

RAPE. See Criminal Law, 43-52.

RECEIVER.

1. **EX PARTE APPOINTMENT—BASIS FOR DETERMINING VALIDITY—SUBSEQUENT PROCEEDINGS IMMATERIAL.**—The validity of an *ex parte* order appointing a receiver must be determined by the proceedings upon which it was based; and, aside from any imperfection in the bond, any proceedings taken subsequently to the making of the order when a motion to vacate the order was noticed and heard, including an amended complaint then allowed to be filed, are wholly immaterial. (Hobson v. Pacific States Mercantile Co., 94.)
2. **INSUFFICIENT COMPLAINT—OBJECT OF ACTION—APPOINTMENT OF RECEIVER OF INSOLVENT CORPORATION—WANT OF NOTICE.**—Where the original complaint on which the order was based did not state a cause of action, and had for its object merely to appoint a receiver of a corporation, alleged on information and belief to be insolvent, and a receiver was appointed upon the verified complaint to take possession of all of the assets of the corporation without notice, the order has no validity and must be reversed. (Id.)
3. **APPOINTMENT MUST BE ANCILLARY TO PENDING CAUSE OF ACTION.**—There is no such thing as an action brought merely for the appointment of a receiver. Such an appointment, when made, must be ancillary to a pending and independent cause of action, and its purpose is to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective. (Id.)
4. **JURISDICTION OF EQUITY—INSOLVENT CORPORATION.**—A court of equity has no inherent power to appoint a receiver of an insolvent corporation merely because of its insolvency, or to wind up its affairs, in the absence of a statute; and no statute authorizes a private person, either as stockholder or creditor, to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to place its property in the hands of a receiver. (Id.)

RECEIVER (Continued).

5. NOTICE REQUISITE AS A RULE—IRREPARABLE INJURY—TEMPORARY INJUNCTION.—As a general rule, the appointment of a receiver to take property out of one's possession without a trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice; and even in such extreme case a temporary injunction would usually be sufficient. (Id.)

See Appeal, 7.

ROBBERY. See Criminal Law, 53-72.

SALE. See Agency; Contract, 1-5, 14-26.

SLANDER.

1. ACTION FOR SLANDER—DISMISSAL—ATTORNEY'S FEES—DECISION UPON FORMER APPEAL—PROPER JUDGMENT UPON REMITTITUR—NOTICE.—Where the plaintiff brought an action for slander, and caused the clerk to enter a dismissal thereof after defendant had incurred costs in taking steps to procure a dismissal thereof, and had included \$100 for counsel fees in his cost-bill, and upon a former appeal from an order striking out the counsel fees the order was reversed, leaving the cost-bill as to attorney's fees intact, upon going down of the remittitur, the court properly rendered judgment against plaintiff for \$100 counsel fees, without further notice and hearing, as an incident to the judgment, and for the further sum of \$32 costs upon appeal, to which no objection was taken. (Gaffey v. Mann, 712.)
2. CONSTITUTIONALITY OF COUNSEL FEES IN SLANDER CASES—LAW OF CASE.—No constitutional objection appears to the allowance of counsel fees to the prevailing party in an action for slander, under a law passed prior to the adoption of the present constitution; but without passing definitely upon that question, it is sufficient to say that the decision made upon the former appeal for the allowance of counsel fees to the respondent has become the law of the case, and this decision has become final. (Id.)

SPECIFIC PERFORMANCE.

1. DEFINITE DESCRIPTION OF LAND—PAROL EVIDENCE—NEW DESCRIPTION.—In an action for the specific performance of a contract for the sale of lots, where the description in the contract is definite, certain, and complete, and described land not belonging to the defendants, parol evidence is inadmissible to show that the contract was intended to describe lands elsewhere situated belonging to the defendants, by a new and wholly distinct description, which is

SPECIFIC PERFORMANCE (Continued).

- sought to be made the subject of the action. (*Willmon v. Peck*, 665.)
2. **DISREGARD OF PAROL EVIDENCE ADMITTED—FINDING.**—Where the court improperly admitted parol evidence to supply a new and distinct description of land, such evidence was entitled to no weight whatever, and the court properly disregarded it, and found that the contract was fatally defective for want of description of the land claimed in the action to be covered thereby. (*Id.*)
3. **CONTRACT TO CONVEY REAL ESTATE TO CORPORATION—SUFFICIENCY OF COMPLAINT.**—In an action by an oil company to enforce specific performance of a contract by defendant to convey three lots of land thereto, where the complaint shows that, in consideration of a purchase of land from the defendant, including the three lots afterward acquired by him for the purpose of erecting the refinery thereon, it had issued its capital stock, which defendant accepted and retained, and that it has erected valuable improvements on the three lots, which defendant had refused to convey, and alleged that the contract to convey the three lots was reasonable and just to the defendant, it states a cause of action, and a demurrer thereto was properly overruled. (*Meridian Oil Co. v. Dunham*, 367.)
4. **RULE AS TO PLEADING VALUE OF LAND INAPPLICABLE.**—The well-recognized rule that in actions for specific performance the complaint must state the value of the land, or other facts showing that the consideration is adequate, is not applicable to the facts existing in this case. (*Id.*)
5. **ESTOPPEL OF DEFENDANT TO QUESTION ADEQUACY.**—After accepting and retaining the agreed consideration for the whole purchase, the defendant cannot question the adequacy thereof. (*Id.*)
6. **PAROL CONTRACT—PART PERFORMANCE—IMPROVEMENTS.**—Though the contract to convey the land was by parol, a specific performance of it may be enforced, when the payment therefor has been accompanied not only by a change of possession, but by a large expenditure of money upon the lots by way of improvements thereon, consisting of a number of tanks constituting a part of the plant of its oil refinery. (*Id.*)
7. **PLEADING AND PROOF AS TO IMPROVEMENTS.**—Where the contract did not in terms call for an improvement, it was not necessary to allege or prove that the improvements upon the property were made pursuant to the agreement. (*Id.*)
8. **DOCUMENTARY EVIDENCE—ERROR NOT DISCLOSED.**—Where no error in the admission or exclusion of documentary evidence is shown, for the reason that no copy thereof is included in the record upon appeal, it must be concluded that the ruling of the court thereon was correct. (*Id.*)

SPECIFIC PERFORMANCE (Continued).

9. **ORIGINAL BOOK ENTRY SHOWING CONTRACT.**—The original book entry showing the contract between the corporation and the defendant for the purchase of the land and lots described at a certain price, to be paid for in stock, was properly admitted as showing the terms of the agreement with defendant as the president. (Id.)
10. **IMPROPER EVIDENCE—UNDERSTANDING AND INTENTION OF DEFENDANT—CONCLUSION.**—Questions on direct examination of the defendant as to his understanding and intention to convey the lots in question were properly disallowed as calling for the conclusion of the witness. (Id.)
11. **DISPOSITION OF STOCK IMMATERIAL—AID OF COMPANY.**—The subsequent disposition of the stock received in consideration of the purchase of the land and lots, by placing it in the hands of the trustees to aid the company in tiding over the financial distress, could not, in the absence of an agreement so to do, release appellant from his obligation to convey the property, and was immaterial. (Id.)
12. **ADVANCEMENT OF MONEY TO CORPORATION—POSITION OF CREDITOR.**—The advance of money by the defendant to the corporation only placed defendant in a position in common with other creditors thereof, and could not entitle him to withhold the conveyance of the lots unless his claim was paid. (Id.)
13. **CONTRACT OF SALE—SUPPORT OF FINDINGS.**—*Held*, that the evidence in the record conclusively supports the findings that the defendant entered into an agreement to sell the lots in controversy, and that his conduct was such as to estop him from claiming the contrary. (Id.)

See Place of Trial.

STARE DECISIS.

1. **CLAIM AND DELIVERY—CROPPING LEASE—TENANCY IN COMMON—LAW OF THE CASE.**—In an action of claim and delivery where the court decided on a former appeal that the instrument of lease between the parties must be deemed only a cropping contract, and that by virtue of its provisions the parties were cotenants in the fruits raised during the time of the contract, and that each has an equal right with the other to the possession of the fruit, the construction of the contract is the law of the case upon a second appeal. (Adams v. Thornton, 455.)
2. **RIGHT TO NONSUIT—DISTINCT EVIDENCE—LAW OF CASE INAPPLICABLE.**—The decision upon the former appeal that the defendant was entitled to a nonsuit is not the law of the case upon the second appeal, where the evidence at the second trial is so distinct as to render the granting of a nonsuit thereat erroneous. (Id.)
3. **REPLEVIN MAINTAINABLE WHEN SHARE MAY BE ASCERTAINED.**—Where the personal property held in cotenancy is readily divisible

STARE DECISIS (Continued).

by weight or measurement into portions absolutely alike in quality and value, and an equal division thereof was in fact made by the cropping tenant, placed in separate piles, each pile having a separate letter, and the lessor's share was tendered to him and refused, and the lessor took possession of all the fruit and refused to return the tenant's share upon demand, replevin by the cropping tenant may be maintained to secure his share of the crop from the lessor. (Id.)

4. **ARGUMENT UPON APPEAL—POINT MADE IN REPLY BRIEF.**—The fact that the point was first made by appellant in his reply brief that the law of the case does not apply where the plaintiff's evidence is different upon the new trial does not preclude the decision of the point by this court. (Id.)

See Bond, 1, 2; Eminent Domain, 1, 2.

STATE LANDS.

1. **RECESSION OF LAKE—TRUTH OF AFFIDAVIT—SUBSEQUENT AGREEMENT TO SELL BEFORE CERTIFICATE.**—Where it appears that at the time of an application to purchase state lands uncovered by the recession of a lake, in pursuance of the act of 1893, that the prior applicant truthfully stated in his affidavit that he desired to purchase the land "for his own use and benefit, and for the use and benefit of no other persons whatsoever," a subsequent agreement to sell the land to another person about forty days after the application and before the issuance of the certificate of purchase is not forbidden by that statute, nor by any statute of the state for the sale of state lands. (Bryan v. Graham, 599.)
2. **STATUTE ALLOWING SALE OF CERTIFICATE—CONSTRUCTIVE POLICY OF LAW—RESTRAINTS UPON ALIENATION.**—The express statutory grant of the right to sell "certificates of purchase and all rights acquired thereunder," in section 1315 of the Political Code, cannot be construed as an expression of legislative intent that one who agreed to sell after filing his application, and before the issuance of his certificate of purchase, should lose his right to purchase. The policy of the law is to discourage restraints upon alienation. (Id.)
3. **EFFECT OF SUBSEQUENT CONTRACTS OF SALE AS EVIDENCE—CONFLICT OF EVIDENCE—SUPPORT OF FINDING.**—Assuming that contracts to sell made subsequently to an application to purchase state lands, before the issuance of a certificate, would constitute any evidence tending to show the falsity of the affidavit, which would defeat the purchase, yet where it appears that there was nevertheless a conflict of testimony upon the issue as to whether or not defendant, at the time he made the prior application to purchase, did so for his own use and benefit, the finding of the court in his favor on that issue cannot be disturbed upon appeal. (Id.)

STATUTE OF LIMITATIONS.

1. **ACCOUNT STATED—UNPAID INTEREST ON BARRED NOTE PAID AND SURRENDERED.**—Where at the time of stating an account purporting to be for unpaid interest on a note which was barred by the statute of limitations, and which had been fully paid and surrendered more than six years prior to such account stated, the cause of action for such interest is barred by section 337 of the Code of Civil Procedure. (*Visher v. Wilbur*, 562.)
2. **EFFECT OF ACCOUNT STATED—OPERATION OF STATUTE.**—As soon as an account ceases to be open and the balance is ascertained and assented to, it becomes a stated account, and the balance is at once subject to the operation of the statute. (*Id.*)
3. **EVIDENCE UPON ACCOUNT STATED—BAR OF STATUTE.**—Upon the theory that the action was for money had and received upon an account stated, any evidence relevantly bearing upon the alleged bar of the statute pleaded in the answer was admissible to show that the account stated was for interest on a barred note. (*Id.*)
4. **TRUST THEORY OF COMPLAINT—VARIANCE—PROOF OF RELATION OF DEBTOR AND CREDITOR.**—A trust theory of the plaintiff as to the money evidenced by the promissory note is at variance with evidence showing simply and only the relation of debtor and creditor between the parties, and that the particular transaction from which the alleged indebtedness arose was in no manner impressed with the qualities of a trust. (*Id.*)
5. **ACKNOWLEDGMENT OF DEBT—NEW PROMISE—LETTERS WRITTEN TO HEIR—SUBSEQUENT APPOINTMENT AS ADMINISTRATOR.**—Assuming that letters written by the supposed debtor to a single heir of the creditor, who at the time was not a representative of the estate, or authorized to bind it, contained language which, if written to the creditor or his personal representative, would constitute a sufficient acknowledgment to take the debt out of the operation of the statute, they could not have that effect, there being no privity of contract between the debtor and the heir; and the subsequent appointment of the heir as administrator could not have the effect to revive the right of action because of such prior letters. (*Id.*)
6. **REVIVAL OF BARRED CLAIM—WRITING ESSENTIAL—EXPRESS OR IMPLIED PROMISE—UNEQUIVOCAL ACKNOWLEDGMENT OF DEBT.**—In order to revive a claim which is barred by statute, a writing is essential, and it must contain either an express or implied promise to pay an existing debt. In the absence of an express promise, the acknowledgment must be unequivocal, and must contain a direct and unqualified admission of an existing debt for which the party is liable, and which he is willing to pay. (*Id.*)
7. **INSUFFICIENT ACKNOWLEDGMENT—VAGUE AND CONDITIONAL DECLARATION.**—A vague, indeterminate and conditional declaration in a letter that if the estate has any valid claim against the writer

STATUTE OF LIMITATIONS (Continued).

he will pay it if he ever gets money enough to do so does not constitute an acknowledgment from which even a conditional promise to pay the specific debt declared upon can be implied. (Id.)

8. **PLEADING—EVIDENCE—VARIANCE IN PROMISE.**—Where one new promise is set forth in the complaint, the plaintiff cannot recover upon proof of another. (Id.)
9. **CLAIM AGAINST ESTATE—CREDIT OF ACCOUNT SUED UPON—SUBSISTING DEBT NEGATIVED.**—A claim presented by the defendant against the estate, allowing a credit for the account sued upon, and showing a balance due from the estate to the defendant, does not show an acknowledgment of any subsisting debt as to such account, but expressly negatives such inference. (Id.)
10. **FINDING UPON BAR OF STATUTE—RULING UPON EVIDENCE WITHOUT PREJUDICE.**—Where a finding that the cause of action was barred by the statute of limitations is supported by the evidence, any rulings upon evidence which was offered and received on the merits of the case, having no relation to the plea of the statute, whether erroneous or not, were without prejudice. (Id.)

See Agency, 8; Bond, 4; Contract, 27; Criminal Law, 13-15; Estates of Deceased Persons, 2-4; Husband and Wife, 4; Mortgage, 1-3; Pleadings, 5.

TAXATION.

1. **TAX TITLE—OBJECTIONS TO EVIDENCE—RESERVATION OF RULINGS BY COURT—REASONS NOT STATED.**—Where the defendant relied upon a tax title derived from the state, objections to the introduction of which were formally stated, and the defendant had full opportunity to answer them, and rulings thereupon were reserved with the consent of both parties, it cannot be held that the defendant was prejudiced by the final ruling excluding the title without stating the reasons for such ruling. (Preston v. Hirsch, 485.)
2. **INVALID CERTIFICATE OF SALE—FAILURE TO RECITE YEARS OF ASSESSMENT—VOID DEED.**—Under section 3776 of the Political Code requiring a certificate of sale by a tax collector to the state for delinquent assessment to recite the year of the assessment, a certificate which recites that the property was assessed in the year 18— is void and a deed issued thereunder to the state conveyed no title. (Id.)
3. **RECITAL OF YEAR IN CAPTION.**—The recital of the year in the caption of the certificate is immaterial. The caption is no part of the certificate to which the tax collector certified, and cannot be referred to in aid of the certificate in a matter required by the statute to appear therein. (Id.)
4. **PROCEEDINGS ON TAX SALE IN INVITUM—STRICT PURSUIT OF STATUTES.**—Proceedings on tax sale are *in invitum*, and to be valid must

TAXATION (Continued).

be *stricti juris*. The power exercised is purely statutory, and the steps directed by the statute must be strictly pursued. (Id.)

See Irrigation District, 1-8; Lease, 9.

TRUST.

1. **SALES BY TRUSTEE—CONFIRMATION BY COURT—ABSENCE OF LAW—TERMS OF INSTRUMENT CONTROLLING.**—In the absence of express law in this state requiring sales of property by a trustee, testamentary or otherwise, to be confirmed by a court, resort must be had to the terms of the instrument creating the trust and defining the duties of the trustee in determining whether the power of sale is unqualified or not subject, under any circumstances, to be controlled or interfered with by a court. (Murphy v. Union Trust Co., 146.)
2. **POWER OF TRUSTEE TO REINVEST AND TO SELL—CONFIRMATION—SPECIFIC PERFORMANCE—WANT OF JURISDICTION.**—Where the instrument creating the trust vested the trustee with full title and power to change the investment and to reinvest with full power of sale in relation to the real property, the superior court had no jurisdiction of a petition by the trustee to confirm a proposed bid, unless a higher bid is obtained in court, or of an intervention by the proposed purchaser to enforce a confirmation of the sale by way of specific performance of an alleged contract of sale, and the court properly dismissed both proceedings, without reference to the moot question whether the alleged contract of sale did or did not exist. (Id.)
3. **ENFORCEMENT OF TRUST—COMPLAINT—DEATH OF PARTIES—LACHES BARRING ACTION—GENERAL DEMURRER.**—In an action by the administrator of a deceased wife against the administratrix of the deceased husband to enforce a trust, where the complaint shows that the trust arose out of a transaction occurring more than forty-five years before the action was begun, that there was no accounting between the parties, that an accounting would involve purchases and sales extending through more than forty-five years, and after their death, it is manifest that the court cannot do complete justice at so late a day, such laches appears upon the face of the complaint as to bar any right of action, and the defense thereof may be raised by general demurrer to the complaint, which it was error to overrule. (Elliott v. Clark, 8.)
4. **ACCOUNTING OF TRUST MONIES—PLEADING—ABSENCE OF DEMURRER TO COMPLAINT—INFERENTIAL AVERMENT—DEPOSIT IN BANK IN TRUST.**—In an action for an accounting of money alleged to have been delivered in trust by plaintiff to the defendant, although the complaint does not in direct terms allege that defendant accepted the money in trust, or agreed to keep, deposit or invest it for the plain-

TRUST (Continued).

tiff, yet, in the absence of any demurrer, it is sufficient that such essential fact appears inferentially from an averment that the defendant deposited a specified part of the money in a certain savings bank in trust for the plaintiff. (Dillon v. Cross, 766.)

5. **ACTION IN EQUITY—JURY TRIAL.**—The court was justified in treating the action as one in equity, in which the defendant was not entitled to a jury trial. (Id.)
6. **CONTINUING TRUST—STATUTE OF LIMITATIONS—DEMAND AND REFUSAL.**—Where the case made by the pleadings and the evidence was a continuing trust, the statute of limitations did not commence until demand and a refusal of the defendant to account for the money which occurred shortly before the action was begun. (Id.)
7. **FINDINGS—CONSISTENCY—MONEY PAID DURING MINORITY AND AFTER MAJORITY.**—*Held*, that a finding that as to money paid by plaintiff to defendant during his minority, the defendant, who was plaintiff's father, did not relinquish his right to the money so paid, is not inconsistent with a finding that the money delivered to plaintiff after majority was delivered to defendant in trust, to be kept invested and deposited for plaintiff. (Id.)
8. **ACCOUNTING—PAYMENTS BY DEFENDANT—COUNTERCLAIM—COMPENSATION OF CROSS-DEMANDS.**—In the accounting between the parties, payments made by defendant to plaintiff, defendant is entitled to credit for, though pleaded as a counterclaim, and the statute of limitations cannot apply to the right to such credits. The cross-demands must be deemed compensated so far as they equal each other, under section 440 of the Code of Civil Procedure. (Id.)

See Agency, 8; Estates of Deceased Persons, 5.

UNLAWFUL DETAINER. See Lease, 8.

VENDOR AND VENDEE. See Agency, 10-12; Specific Performance,

VENUE. See Place of Trial.

WARRANTY. See Agency, 1-3; Contract, 18.

WATER AND WATER RIGHTS.

1. **WATER RIGHTS—WATER FLOWING FROM WELLS ON ABANDONED OIL CLAIM—INEFFECTIVE DEED.**—Where an oil mining claim has been abandoned by the owner, after sinking several wells thereon, without the discovery of oil, the abandoned claim reverts to its original status as part of the public domain; and a subsequent deed from the original owner, conveying all right in the land and in the wells

WATER AND WATER RIGHTS (Continued).

and water therein and flowing therefrom, is ineffective to convey any interest in the land or water. (*Wolfskill v. Smith*, 175.)

2. **APPROPRIATION OF WATER IN STREAMS ON PUBLIC LAND—ORIGIN IMMATERIAL—PERCOLATION.**—Water flowing in a stream on public land, whether from a spring, or from abandoned wells situated thereon, is subject to appropriation under section 410 of the Civil Code. The fact that the stream may be owing to the percolation of water, whether caused naturally in a flowing spring or artificially in flowing wells bored in the ground, is immaterial. The stream in each case is equally the subject of appropriation. (*Id.*)
3. **MODE OF APPROPRIATION—NOTICE—DILIGENT PROSECUTION OF WORK—RELATION TO NOTICE—HINDRANCE BY SETTLER.**—Under the Civil Code, the posting of the notice of claim to the water does not alone constitute an appropriation, but within sixty days thereafter the construction of the means of diversion must be commenced and prosecuted diligently and uninterruptedly, and when completed the claimant's right to the use of the water relates to the time of posting the notice. But where the wells were capped by a subsequent settler on the land so as to hinder the completion of the work, said settler is in no condition to assert that the claimant had failed to prosecute the work with diligence and to become an active appropriator. (*Id.*)
4. **PRIORITY OF RIGHT OF WAY AGAINST SETTLERS.**—Under the act of Congress of July 16, 1866, and the amendments thereto, the right of way for vested and accrued water rights and rights to ditches used in connection therewith are assured against subsequent settlers and homestead claimants. (*Id.*)
5. **EFFECT OF POSTING NOTICE—VESTED RIGHT.**—By posting the notice of claim in a conspicuous place at each of the wells, before any settlement including the same, the claimant became vested with the right to use the stream of water flowing therefrom, together with the right to construct over and across the land the necessary ditches to convert and conduct the same to the place of intended use, as against any subsequent settlers whose claim included the same or any part thereof. (*Id.*)
6. **SUFFICIENT RECORD OF NOTICE—ACKNOWLEDGMENT NOT REQUIRED.** Where the notice posted at each well was identical, it was only necessary to record one copy thereof, and no acknowledgment of the notice was necessary to insure its proper record. The purpose of recording is to furnish notice of claimant's rights to subsequent settlers upon the land, or subsequent appropriators of the water; and the record of a single copy of the notice is sufficient for that purpose. (*Id.*)
7. **RIGHT OF WAY FOR PIPE-LINE.**—The fact that one of the defendants, prior to plaintiff's appropriation of the stream of water, had

WATER AND WATER RIGHTS (Continued).

taken steps to obtain a right of way for a pipe-line over the land, the boundaries of which proposed right of way included the land on which the wells were located, gave him no right as against plaintiff's appropriation of the stream of water flowing therefrom. (Id.)

- 8. LIMIT OF VESTED WATER RIGHT—DEVELOPMENT OF ADDITIONAL WELLS NOT INCLUDED.**—The vested water right belonging to the appropriator of the stream of water flowing from the existing wells, as against subsequent claimants of the land, is limited to the right to complete the construction of the ditch so as to divert such stream to the point of intended use, and does not include the right to enter upon the land for the purpose of developing water by boring additional wells. (Id.)

See Eminent Domain, 7-11.

WILLS. See Estates of Deceased Persons, 5-12.
